Supreme Court, U.S.
FILED

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No. 031111 JAN 29 2004

In The
Supreme Court of the United States

THE SOUTH DAKOTA SECRETARY OF STATE
AND THE SOUTH DAKOTA ATTORNEY GENERAL,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ALONG WITH SEVEN OTHER STATES, SOUTH DAKOTA GENERALLY PROHIBITS CORPORATIONS FROM FARMING AND OWNING FARMLAND. SOUTH DAKOTA ADOPTED THE MOST RECENT EXTENSION OF THIS PROHIBITION THROUGH AN INITIATED MEASURE APPROVED BY ITS CITIZENS THAT AMENDED THE STATE CONSTITUTION. THE EIGHTH CIRCUIT HELD THAT THE AMENDMENT VIOLATES THE DORMANT COMMERCE CLAUSE BECAUSE "THE LAW HAS A DISCRIMINATORY PURPOSE." THE QUESTIONS PRESENTED ARE:

1. WHETHER THE DESIRE TO SAFEGUARD CITIZENS FROM ANTICIPATED SOCIOECONOMIC AND ENVIRONMENTAL PROBLEMS CAUSED BY SPECIFIC OUT-OF-STATE CORPORATIONS IS A DISCRIMINATORY PURPOSE UNDER THE DORMANT COMMERCE CLAUSE?

2. WHETHER IT IS PROPER FOR A COURT TO CONCLUDE THAT A STATE LAW DISCRIMINATES AGAINST INTERSTATE COMMERCE, AND IS THEREFORE SUBJECT TO STRICT SCRUTINY, BASED ON A FINDING THAT THE LAW WAS ENACTED WITH A DISCRIMINATORY PURPOSE, WITHOUT CONSIDERING THE ACTUAL LANGUAGE OR ACTUAL EFFECT OF THE LAW?

3. WHETHER IT IS PROPER FOR A COURT, WHEN ASSESSING WHETHER A CITIZEN-APPROVED INITIATIVE HAS THE PURPOSE OF DISCRIMINATING AGAINST INTERSTATE COMMERCE, TO FOCUS PREDOMINANTLY ON THE INTENTIONS OF THE DRAFTERS OF THE INITIATIVE?

PARTIES

The following are parties to the proceeding before the Court. Each of the parties was also a party below and is listed pursuant to Rule 14(1)(b).

The South Dakota Secretary of State
The South Dakota Attorney General
South Dakota Farm Bureau, Inc.
South Dakota Sheep Growers Association, Inc.
Haverhals Feedlot, Inc.
Sjovall Feedyard, Inc.
Frank D. Brost
Donald Tesch
William Aeschlimann
Spear H. Ranch, Inc.
Marston Holben
Marston and Marian Holben Family Trust
Montana-Dakota Utilities Company
Northwestern Public Service Company
Otter Tail Power Company
Dakota Rural Action
South Dakota Resources Coalition

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PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-27) is reported at 340 F.3d 583. The decision of the United States District Court for the District of South Dakota (App. 28-88) is reported at 202 F. Supp. 2d 1020.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on August 19, 2003. A timely petition for rehearing was denied on October 31, 2003. App. 89. The jurisdiction of this Court is invoked under 25 U.S.C. § 1254(1).

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

The negative aspect of the commerce clause, United States Constitution, Article I, Section 8, Clause 3, is involved. It provides that "The Congress shall have power . . . To regulate commerce . . . among the several states[.]"

The state constitutional provisions at issue are South Dakota Constitution, Article XVII, Sections 21 through 24. App. 90-94.

STATEMENT OF THE CASE

A. Statutory and State Constitutional Background.

South Dakota, like twenty other states,[1] has a state constitutional provision providing for direct democracy through initiated measure. S.D. Const. art. III, § 1. By this means state citizens have the right to propose and enact state constitutional amendments. The state constitutional amendment challenged in this case was developed through the initiative process and is known as "Amendment E." It was passed in 1998 and prohibits corporations from farming.

Amendment E follows the path charted by similar laws enacted in other states. For example, since 1936 North Dakota has had a constitutional provision in place that prohibits corporate farming. *See Asbury Hospital v. Cass County*, 326 U.S. 207, 214 (1945) (holding that North Dakota's law barring corporations from owning farmland is an appropriate legislative application of a state policy against the concentration of farmland in corporate ownership). In addition to North and South Dakota, seven other

[1] Alaska, Arizona, Arkansas, California, Colorado, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Utah, Washington, and Wyoming.

states have also enacted laws barring corporations from owning farmland or otherwise limiting corporate farming.[2]

South Dakota enacted its first such law in 1974: the Family Farm Act. The 1974 law limited some types of farming by corporations. SDCL ch. 47-9A. The 1974 Act declared "the importance of the family farm to the economic and moral stability of the state," and stated that the "existence of the family farm is threatened by conglomerates in farming." SDCL 47-9A-1. The Act, which remains unchallenged, therefore prohibits corporations (except for family farms and "authorized small farm corporations") from engaging in farming (defined in the Act as the cultivation of land).

In 1988, these statutes were amended to cover confined hog operations, but only those that bred, farrowed, *and* raised swine. SDCL 47-9A-13.1. Swine operations that acquired feeder pigs and then raised them remained exempt from the 1974 Act. SDCL 47-9A-13.1. Other types of corporate livestock feeding operations were likewise not restricted by the Family Farm Act. SDCL 47-9A-11. The people of the State of South Dakota concluded, however, that these amendments did not cure all of the problems engendered by corporate farming.

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[2] Kan. Stat. Ann. § 17-5904 (1995 and Supp. 2002); Minn. Stat. Ann. § 500.24 (West 2002); Wis. Stat. Ann. § 182.001(1)(a) (2002); Okla. Const. art. 22, § 2; Iowa Code Ann. § 9H.4 (2001); Mo. Rev. Stat. 350.01 (Vernon 2001); Neb. Const. art. XII, § 8. *See also State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801 (Mo. 1988) (Missouri statute); *MSM Farms, Inc. v. Spire*, 927 F.2d 330, *cert. denied*, 502 U.S. 814 (1991) (Nebraska constitutional provision).

In particular, since the 1970s the amount of production contracts – where corporations place young livestock (like feeder pigs) with farmers who raise them for corporations – have increased significantly.[3] In addition, agricultural and livestock ventures have increasingly changed from traditional agricultural business structures (single proprietorship and partnerships) to business structures such as limited liability corporations and other types of corporations. According to South Dakota's Agricultural Census, the number of farm corporations in South Dakota more than doubled in the period from 1978 to 1997. While the number of corporations grew, the number of farmers declined. The number of farm operators (by principal occupation) in South Dakota fell from around 36,821 in 1974 to approximately 22,704 in 1997.

Moreover, in studies ranging from a 1920's study in California[4] to several recent nationwide projects,[5] social scientists have found that industrialized farming causes detrimental effects to family farms and to rural communities. Such effects include reduction in the number of family farmers, social disruption, high crime rates, lower

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[3] These types of hog contracts are explained further in *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568, 571 (Ark. 2002) and *Tyson Foods, Inc. v. Stevens*, 783 So.2d 804, 805, 806 (Ala. 2000).

[4] Walter Goldschmidt, *Small Business and the Community: A Study in the Central Valley of California on Effects of Scale of Farm Operations*, reprinted by Senate Special Committee to Study Problems of American Small Business, 79th Cong., 2d Sess., Report of the Special Committee 13 (Comm. Print 1946).

[5] For a list of reports, *see* Linda Lobao, *Locality and Inequality: Farm and Industry Structure and Socioeconomic Condition*, 60-64 (State Univ. of N.Y. Press 1990). Dr. Lobao, an expert in socioeconomics, also testified at trial regarding the studies and their results. T 449-476.

education attainment, lower total community employment, a decline in quality of local governance, and lack of civic participation.[6] Federal policymakers have also analyzed the structure of farming and determined that public policies should not encourage the shift to large farming operations and the control of the nation's food production by a few large corporations. *A Time to Choose: Summary Report of the Structure of Agriculture*. USDA. Washington, D.C. (1981); *A Time to Act: A Report of the USDA National Commission on Small Farms*, Washington, D.C. (1998).

Ultimately, in 1998, Amendment E was placed on the ballot in South Dakota. Its prohibitory provision, now codified at S.D. Const. art. XVII, § 21, states: "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." The measure was designed to extend the prohibitions of the 1974 Family Farm Act, as amended in 1988, by more generally barring corporate ownership of farmland, and by barring corporate livestock feeding operations as well.

The Office of the Secretary of State, pursuant to South Dakota statute, circulated a pamphlet to the public which contained an "Attorney General Explanation" of the Amendment, along with "Pro" and "Con" statements containing (verbatim) the views of proponents and opponents of the measure. App. 95-99. The "Pro" statement contained seven paragraphs, the first two of which emphasized that "[f]amily agriculture is the economic foundation

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[6] Dr. Lobao testimony. T 475, 476. *See also* footnote 5.

for South Dakota communities" and that "large non-family farm corporations increasingly threaten our traditional rural way of life." App. 96. The fifth paragraph added that non-family farm corporations "have track records of significant and repeated environmental violations." App. 97. The sixth paragraph noted that "[d]esperately needed profits will be skimmed out of local economies and into pockets of distant corporations." App. 97. Meanwhile, the first specific objection set forth in the "Con" statement was that "[t]he language of Amendment E does not clearly distinguish between South Dakota farmers and out-of-state based farmers and ranchers." App. 98.

Amendment E passed by a vote of 59 percent to 41 percent and became effective on November 16, 1998. It is now included in the South Dakota Constitution as Article XVII, Sections 21-24.

B. Procedural Background.

1. United States District Court for the District of South Dakota.

Thirteen entities, including South Dakota trade associations, several individuals, and three utilities, challenged Amendment E by filing suit in District Court. The action was filed under 42 U.S.C. § 1983 (dormant Commerce Clause and Fourteenth Amendment claims), and 42 U.S.C. § 12101 *et seq.* (Americans with Disabilities Act ("ADA") claim). The utilities claimed that, as corporations, they would violate Amendment E if they purchased easements for utility transmission lines or if they held agricultural property pending development of a new power plant. The South Dakota Farm Bureau claimed that Amendment E discriminated against its disabled members

and therefore violated the ADA, a claim they dropped early in the litigation. App. 10. The remaining plaintiffs generally challenged Amendment E under the dormant Commerce Clause, claiming that South Dakota farmers who do business on an interstate basis are harmed by Amendment E.

At trial, several defense experts testified regarding various academic and governmental studies and reports showing that corporate farming is detrimental to family farmers and rural communities in terms of social well-being, health, and the environment. The District Court found that Amendment E was unconstitutional under the dormant Commerce Clause in that it impaired utilities from holding necessary agricultural property for use in delivering interstate electric services. App. 71-74, 87. Also, the District Court renewed the ADA claim that had previously been dropped. App. 62-71. The District Court held that the ADA preempted Amendment E and that Amendment E was therefore invalid. App. 70-71.

2. Eighth Circuit Court of Appeals.

The Eighth Circuit reversed the District Court's ADA ruling, but affirmed the District Court's Commerce Clause judgment, albeit for different reasons. The Court of Appeals stated that a law discriminates against interstate commerce, and is therefore subject to strict scrutiny, if it discriminates on its face, discriminates in its effect, or has a discriminatory purpose. App. 17, 18. The court then concluded, without analyzing the wording of Amendment E or its effects, that Amendment E was enacted for a discriminatory purpose and does not satisfy strict scrutiny.

The Eighth Circuit principally focused on the intentions of the drafters of Amendment E. The court pointed to minutes of drafting committee meetings, at which individuals expressed their desire to keep two large out-of-state hog feeding businesses – Murphy Farms, Inc.[7] (a North Carolina subsidiary of packer Smithfield Foods, Inc.) and Tyson Foods, Inc. (an Arkansas corporation) – from operating in South Dakota.[8] App. 19, 20. In referring to one of the drafters, the court stated: "Even more blatant was the remark at trial by Wiese that Amendment E was at least motivated in part by 'the Murphy hog farm unit

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[7] Also referred to as Murphy Family Farms, Inc.

[8] Tyson's production contracts (and associated problems) are well documented. *Tyson Foods, Inc. v. Davis*, 66 S.W.3d at 570, 581 (false representations in dealing with contract hog growers resulting in punitive damages of almost $900,000); *Tyson Foods, Inc. v. Stevens*, 783 So.2d at 811 (recurring odor problems from hog facilities resulting in punitive damages of $25,000); *Sierra Club, Inc., et al. v. Tyson Foods, Inc., et al.*, ___ F. Supp. 2d ___, 2003 WL 22595989, at **20, 21 (W.D. Ky. 2003) (failure to report release of hazardous waste (ammonia) from chickens raised under Tyson contract); *City of Tulsa v. Tyson Foods, Inc., et al.*, 258 F. Supp. 2d 1263, 1273, 1296 (N.D. Okla. 2003) (water pollution from chickens grown pursuant to Tyson contractual requirements). Tyson also has a pollution track record from its processing plants. *U.S.E.P.A. v. City of Green Forest, et al.*, 921 F.2d 1394, 1407 (8th Cir. 1991) (upholding $43,000 for forty-three Tyson pollution violations); *Atlantic States Legal Foundation v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990) (continuous pollution over five months). Murphy had its own set of legal problems arising from pollution violations in North Carolina. *American Canoe Ass'n Inc., et al. v. Murphy Farms, Inc. d/b/a Murphy Family Farms, et al.*, 326 F.3d 505 (4th Cir. 2003) (water pollution); *Murphy Family Farms, et al. v. North Carolina Dep't of Env. & Nat. Res.*, 585 S.E.2d 446 (N.C. 2003) (water pollution).

[in North Carolina] and what its [sic] done to the environment.'" (Brackets in original.) App. 20. The court also found the failure of certain individual drafters to know the environmental and economic effects of current laws and Amendment E, their failure to commission their own studies on those issues, and their purported haste in drafting the Amendment to be probative of discriminatory intent. App. 20-22.

In addition, the Eighth Circuit pointed to the "Pro" statement contained within the pamphlet published by the South Dakota Secretary of State as "brimming with protectionist rhetoric" and, therefore, containing evidence of discrimination "as regards the drafters." App. 18. The court pointed to two passages in the "Pro" statement: that "[d]esperately needed profits will be skimmed out of local economies and into pockets of distant corporations"; and that "the opportunity to decide whether control of our state agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few large corporations." App. 19. The court did not mention the passages of the "Pro" statement that discussed the general interest in preserving the "traditional way" of life embodied by family farming or that mentioned the environmental justification for the Amendment. App. 96-97. The Court of Appeals held that these public and private statements, read together, show a discriminatory intent against out-of-state corporations on the part of the drafters.

The Eighth Circuit then applied strict scrutiny to Amendment E, holding that "we must strike it down as unconstitutional unless the Defendants can demonstrate that they have no other method by which to advance their legitimate local interests." App. 25. The court acknowledged the legitimacy of the interests proffered by the state:

"the promotion of family farms and the protection of the environment." App. 25. But, the court held that, there may be "reasonable nondiscriminatory alternatives" that advance those interests. App. 25. The court found that, "[a]lthough the record contains evidence linking industrial farming with poverty and environmental problems, it contains no evidence that suggests, evaluates, or critiques alternative solutions." App. 26.

The court therefore affirmed the District Court's holding that Amendment E is not enforceable.

REASONS FOR GRANTING THE WRIT

Like many farm states, South Dakota has attempted over the years to address problems specifically caused or exacerbated by large corporate farming and livestock operations. These types of statutes date at least as far back as 1936, when this Court upheld (against an equal protection challenge) North Dakota's statute prohibiting corporate farming. *See Asbury Hospital*, 326 U.S. at 214. Notwithstanding the historical pedigree of these laws, the Eighth Circuit ruled that Amendment E violates the dormant Commerce Clause.

Under the Eighth Circuit's rationale, a state may not enact a facially neutral restriction on corporate farming if that limitation is intended to prevent anticipated socio-economic and environmental injuries – injuries that specific out-of-state corporations have already inflicted in other states. The Eighth Circuit's decision contravenes this Court's Commerce Clause jurisprudence and also conflicts with this Court's guidance on discerning legislative purpose. Review by this Court is therefore warranted.

In striking down Amendment E on the basis of its purported discriminatory legislative purpose, the Eighth Circuit dramatically departed from two components of this Court's dormant Commerce Clause jurisprudence. First, the Eighth Circuit disregarded this Court's repeated admonishment that the dormant Commerce Clause protects interstate commerce, not interstate companies. No precedent of this Court supports the proposition that a state is illicitly motivated, and is therefore powerless, when it acts in response to harms caused by specific out-of-state corporations. Second, the Eighth Circuit misconstrued this Court's approach to discriminatory purpose. This Court has never found a state statute (let alone a citizen-enacted initiated law) to violate the dormant Commerce Clause based solely on the motives of individual drafters of the provisions at issue. To the contrary, the Court has always looked to the face or effects of state or local legislation to determine whether the legislation is discriminatory within the meaning of the dormant Commerce Clause. Making matters worse, the Eighth Circuit, in discerning legislative purpose, relied on the motives of individual drafters, a methodology that conflicts with this Court's teachings, which generally minimize the weight that should be accorded such motives.

I. THE EIGHTH CIRCUIT'S ANALYSIS OF SOUTH DAKOTA'S PURPOSE IN ENACTING AMENDMENT E CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

A. The Eighth Circuit's Holding That Responding to Concerns About Specific Out-of-State Corporations Constitutes a Discriminatory Purpose Conflicts With This Court's Dormant Commerce Clause Jurisprudence.

In striking down Amendment E, the Eighth Circuit Court of Appeals concluded that the drafters intended to prevent two specific out-of-state corporations from engaging in harmful behavior within the state. In light of that conclusion, the Eighth Circuit ruled that the motivation of the drafters of Amendment E was unlawfully discriminatory under the dormant Commerce Clause. That ruling is flatly inconsistent with this Court's decisions in *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978), and other cases which instruct that the dormant Commerce Clause does not hamstring the states from responding to local problems caused by out-of-state corporations.

The Maryland statute at issue in *Exxon Corp.* was enacted in response to a survey that "indicated that gasoline stations operated by producers or refiners had received preferential treatment during the period of short supply" caused by the 1973 oil embargo. 437 U.S. at 121. Accordingly, the statute, *inter alia*, barred producers and refiners of petroleum products from operating retail gasoline stations. This Court upheld the statute even though "there are no local producers or refiners" – i.e., all of the companies whose conduct was regulated by the provision at issue were out-of-state companies. *Id.* at 125. The Court held that "the fact that the burden of the

divestiture requirements falls solely on interstate companies . . . does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level." *Id.* This is because

> We cannot . . . accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. As indicated by the Court in *Hughes* [*v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976)], the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.

Id. at 127-28 (citation omitted).

This Court has reaffirmed that principle on numerous occasions. *See, e.g., Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 77-79 (1989) (rejecting contention that New Jersey's denial of tax deduction for federal windfall profit tax payments discriminates against interstate commerce because all of the businesses who pay those taxes are located in other jurisdictions); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987) (rejecting contention that Indiana statute making it more difficult for hostile tender offers to succeed discriminates against interstate commerce merely because "most hostile tender offers are launched by offerors outside Indiana"). The proper inquiry, then, is not whether the citizens of South Dakota were motivated by a desire to protect themselves from injuries they expected specific out-of-state corporations to inflict upon them. Rather, it is how they effectuated that desire: whether the statute "'regulates evenhandedly' . . . without regard to whether the [commerce came] from outside the State." *Minnesota v.*

Clover Leaf Creamery Co., 449 U.S. 456, 471-72 (1981). *See also CTS Corp.*, 481 U.S. at 88 ("Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.").

Moreover, there can be no denying that the citizens of South Dakota have a legitimate interest in promoting "family agriculture," and the "traditional rural way of life" embodied by family farms, the local economy, and the environment. App. 96-97. As noted, in *Asbury Hospital*, this Court held that barring all corporations (except cooperatives) from owning farmland is an appropriate legislative application of a state policy against the concentration of farming lands in corporate ownership. 326 U.S. at 214-15. Other courts have reached the same conclusion with respect to similar measures. *See State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 806 (Mo. 1988) (protecting the welfare of citizens in the traditional farm community is a legitimate state interest); *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir.), *cert. denied*, 502 U.S. 814 (1991) (retaining and promoting family farm operations and preventing unrestricted corporate ownership is a legitimate state interest). Contrary to the Eighth Circuit's ruling, there was nothing inherently improper with the citizens of South Dakota acting to further those goals by regulating the conduct of out-of-state wrongdoers (as well as similarly situated in-state entities).

B. In Determining Whether a State Law Has the Purpose of Discriminating Against Interstate Commerce, This Court Has Focused on the Terms and Effects of the Law, Not Solely on Intent of Legislators or Drafters.

1. Discriminatory Purpose.

The Eighth Circuit's decision also conflicts with this Court's approach to the discriminatory purpose prong of the dormant Commerce Clause analysis. To be sure, the Court has stated that a "finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citation omitted). But the Court has never held that a state law violates the dormant Commerce Clause based *solely* on a finding of discriminatory purpose. Even in *Bacchus*, where the Court found the Hawaii legislature to have the "undisputed" motivation of aiding local industry, the Court stated that "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation *on the means* by which a State can constitutionally seek to achieve that goal." *Id.* at 271 (emphasis added). The improper means employed by the Hawaii legislature was exempting only locally produced beverages from an alcohol tax (*id.*) – a clear example of discrimination on the face of a statute and in a statute's effects.

Likewise, in *Clover Leaf Creamery*, the Court rejected respondents' contention that the state law had a "discriminatory purpose" under the Commerce Clause because its "actual basis was to promote" local industry. 449 U.S.

at 471 n.15. In doing so, the Court cited to an earlier footnote rejecting a "discriminatory purpose" equal protection argument, in which it stated "[w]e will not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry." *Id.* at 463 n.7. By cross-referencing that footnote in response to the Commerce Clause argument, the Court made clear that discriminatory purpose on the part of "some legislators" does not suffice to establish unconstitutional discrimination against interstate commerce. The entity challenging the law must instead look to how the statute operates. *Id.* at 471-72.

A litany of decisions by this Court repeats the fundamental proposition that what determines whether a state law is discriminatory within the meaning of the dormant Commerce Clause is its terms and effects. The question is not intent, but whether the law actually provides for "differential treatment of in-state and out-of-state interests in a way that benefits the former and burdens the latter." *Oregon Waste Sys. Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99 (1994). *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 580 n.13 (1997) (distinguishing other cases because "[h]ere, in contrast, the tax scheme functions by design and on its face to burden out-of-state users disproportionately"); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (discrimination found based on "avowed purpose and its undisputed effect"). *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (finding ordinance invalid due to its "practical effect and design"); *Brown-Forman Distillers v. N.Y. Liquor Authority*, 476 U.S. 573, 579 (1986) ("the critical consideration is the overall effect of the statute on

both local and interstate activity"). Indeed, the only decisions that have found violations of the dormant Commerce Clause without focusing on the actual effect of the challenged statutes have been those where the clear language of the statute itself was discriminatory. *See, e.g.*, *South Central Bell v. Alabama*, 526 U.S. 160, 169 (1999); *Oregon Waste Sys.*, 511 U.S. at 99 (facial discrimination); *Fort Gratiot Landfill v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 367 (1992) (finding that the "provisions unambiguously discriminate against interstate commerce"); *Chemical Waste Management v. Hunt*, 504 U.S. 334, 342 (1992) (facial discrimination).

2. Subjective Intent.

The Eighth Circuit aggravated its departure from accepted dormant Commerce Clause analysis discussed above by basing its ruling not only on "purpose" generally, but on subjective intent as well: the subjective intent of the *drafters* of Amendment E.

Much of the court's analysis looked to statements made by the drafters in nonpublic debate (minutes of drafting group meetings). *See* App. 20, 22. Moreover, even when addressing the "Pro" statements that were circulated to the public, the court found them relevant only insofar as they provided "evidence as regards the drafters." App. 18. The *drafters*, however, were not the ones who enacted Amendment E. Fifty-nine percent of the voters of South Dakota enacted this change to the South Dakota Constitution, not just the drafting committee. The Eighth Circuit can find no support in this Court's precedents for that approach to determining legislative intent.

In the legislative context, this Court has long held that an individual legislator's intent should not be pivotal in considering constitutional questions. *Fletcher v. Peck*, 6 Cranch 87, 130-31 (1810) (impairment of the obligation of contract); *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) (equal protection); *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968) (First Amendment). The reason for not using legislator intent as a determining factor is that "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Id.* at 384. As this Court discussed in *Palmer*, this type of analysis results in inconsistency: the same legislation could be enacted again and found to be valid if the motives of individual legislators were more proper. 403 U.S. at 225. Members of the Court have continued to be reluctant to examine the subjective intent of individual lawmakers, at least in the First Amendment and equal protection areas. *Bush v. Vera*, 517 U.S. 952, 1012 n.9 (1996) (Stevens, J., dissenting, joined by Ginsberg, J. and Breyer, J.) ("it is worth pointing out, as we have on so many prior occasions, that it is often 'difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators' " (quoting *Palmer*, 403 U.S. at 225); *Church of the Lukumi Bababalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring, joined by Rehnquist, C.J.) ("it is virtually impossible to determine the singular 'motive' of a collective legislative body . . . and this Court has a long tradition of refraining from such inquiries" (internal citations omitted)).

The situation here is even more problematic in that the Eighth Circuit made the intent of the *drafters* (not

individual lawmakers) the predominant factor. In doing so, the Eighth Circuit relied heavily on private minutes of the drafting committee and the thought processes of individual drafters (as later relayed during trial). To be sure, the Court held last term that statements made by initiative sponsors during public city council meetings may constitute "relevant evidence of discriminatory intent in a [equal protection] challenge." *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, ___, 123 S.Ct. 1389, 1395 (2003) (citing to *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 268 (1977)). Yet, holding that minutes of *public* meetings are admissible is far different than the Eighth Circuit's conclusion that the minutes of a *private ad hoc group* are not only admissible, but are a predominant factor in considering the validity of the challenged law.

In *Arlington Heights*, the Court held that decision makers may be called to the stand "in extraordinary instances," but noted that such intrusion into the workings of other branches of government is usually to be avoided. 429 U.S. at 268. Here, the Eighth Circuit not only intruded on thought processes, it considered the thought processes of the wrong group – the drafters.

Ultimately, voters adopt or reject proposed initiatives and referendums based on the terms of the proposals and upon the information provided to the voters during public debate on the measure. The public debate here included the "Pro" and "Con" statements (App. 95-99) and other

public information such as various governmental and academic studies, pending court cases, and news events.[9]

The Eighth Circuit's decision to focus instead on nonpublic actions and thoughts of drafters is unsupportable under this Court's precedents.

Specific components of the Eighth Circuit's reasoning highlight the problems that will emerge if courts focus on discriminatory purpose in analyzing dormant Commerce Clause claims – particularly in cases involving citizen-enacted initiatives. For example, the court found probative its finding that the drafting committee "charged forward without hesitation." App. 22. Yet, although Amendment E was drafted over several weeks' time, it was placed on the ballot and available for voter debate for a full year. Any haste of the drafters cannot be imputed to the speed with which voters educated themselves and deliberated on their vote.

Likewise, the Eighth Circuit wrote to "emphasize that no study or forecast was commissioned to evaluate any

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[9] A number of public studies show the detrimental socioeconomic effects to individuals and communities caused by industrialized farming, *supra*, footnote 5. Those effects also include pollution, footnote 8. Further, court cases provide a record of the asymmetrical relationship between farmers and corporations in production contracts in the late 1990s. *See Tyson Foods v. Davis,* 66 S.W.3d at 577, 578 (1994 to 1998 contract relationship for hog production hogs in Arkansas); *Crowell, et al. v. Campbell Soup Company*, 264 F.3d 756, 759, 760 (8th Cir. 2001) (contracts for broiler production in Minnesota from 1987 to the mid-1990s); and *Seegers v. Pioneer Hi-Bred International, Inc.*, 997 F. Supp. 1124 (N.D. Ind. 1998) (seed corn in Indiana); *see also* Cynthia M. Roelle, Comment, *Pork, Pollution, and Priorities: Integrator Liability in North Carolina*, 35 Wake Forest L. Rev. 1055, 1058, 1059 (2000). This unequal relationship was barred by Amendment E.

theories." App. 22. Yet, regardless of whether the drafters commissioned their own study, significant information was available to the voters, farm organizations, and public interest groups. Dozens of studies have been conducted in the last several decades by governmental entities and sociologists.[10] A year of public debate occurred, which the Eighth Circuit completely disregarded merely because those studies were not commissioned by the drafters of Amendment E. This Court's intervention is needed to ensure that the Eighth Circuit's misguided and deeply problematic approach to the dormant Commerce Clause is staunched.

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING.

The decision below is profoundly important from both a practical and jurisprudential perspective. Starting with the former, few issues are of greater importance to the many citizens of the farm belt than the structure of the farm industry. The Eighth Circuit, which has jurisdiction over much of that region, has now significantly hamstrung the ability of states to address the farm structure issue in the manner desired by their representatives and citizens. Eight other states have corporate farming limitations in place, and the Eighth Circuit is already reviewing a dormant Commerce Clause challenge to one of its corporate farming provisions. *Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978 (D. Iowa 2003), *appeal filed*, February 11, 2003 (8th Cir. 03-1411). The continued uncertainty as

[10] *See* footnote 5, *supra*.

to the constitutionality of these laws will adversely affect the ability of the citizens and rural communities in those eight states to plan for the future.

Family farmers investing their time, money, and future in family farms do not just plan for one year at a time. They need to make long-term decisions. An agonizing question involves the future of rural youth. Should youth attend the land grant colleges and major in agribusiness? Will those young individuals have the opportunity to manage family farms? Industrialized farms use little management expertise in the rural areas and rely on a cadre of "hired help."

Planning for farm buildings is an issue. A question exists as to whether barns and other buildings should be constructed and maintained for family farm enterprises if industrialized farming is inevitable. Indeed, in a production contract situation, family farm facilities are practically worthless. Instead, the farmer must build buildings to the specifications of the corporations. T 826.

Importantly, family farmers are determining whether to build the family future around raising and marketing livestock on an independent basis. Traditional family farmers choose a type of livestock and "build up a herd" through hard work and wise genetic planning, among other things. Such tradition would be lost in the industrialized farming environment. If the industry is to be controlled by production contracts, little opportunity for such choices will be available. Past experience in the broiler industry shows that, over a generation, growers cease to have an opportunity to become independent producers and have no control whatsoever over genetics. In the broiler industry the large corporations now own

ninety-five to ninety-eight percent of the broilers at all stages of production and manufacturing. T 827. The companies do not buy broilers on the market, and there is no independent market. T 827. During the entire production period, "the bird never sells." T 827. *See* Peter Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 Wis. L. Rev. 531, 539, 540 (2000). The family that is now slowly building up its herd of livestock (or contemplating doing so by purchasing 4-H calves and the like) may be unable to reap the benefit of such long-term efforts. That is precisely what has already happened in the broiler industry.

Moreover, this Court's resolution will resolve uncertainty in rural community planning. For example, if a few hired workers will replace twelve families, fewer schools will be needed. School boards deciding now whether to replace aging school buildings need to project future enrollment. The same is true for rural hospitals, nursing homes, and other basic community services. Because rural communities generally do not have a diverse group of enterprises supporting the communities, they literally live or die on the one industry: farming. Accordingly, community plans for the future are greatly affected if industrialized farming replaces traditional family farms and the farm population decreases.

Review of the decision below is also important because the decision more broadly jeopardizes the power of states to enact regulations affecting interstate commerce. The Eighth Circuit's approach to the dormant Commerce Clause not only flies in the face of this Court's precedents but would, if left in place, unduly restrict the states' ability to address their citizens' concerns. Any time a state statute

is struck down under the dormant Commerce Clause, the effect is as if Congress preempted a state statute – an impairment of state power of such magnitude that preemption will only be found if that is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). By vastly reducing the burden that must be shown by entities asserting dormant Commerce Clause challenges, the Eighth Circuit has improperly undermined basic federalism principles.

Finally, the issues presented are important because of their impact on citizen-enacted initiatives. Twenty other states provide that citizens may initiate changes in the law through petitions for statewide votes. Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 Iowa L. Rev. 637, 638 (1980). By determining the purpose of a citizen initiative based on the intent of the *drafters* (and not the voters), and not analyzing the effect of the initiative itself, the Eighth Circuit has burdened citizens' rights to petition the government through initiative. *Cf. Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (describing the circulation of an initiative petition as "core political speech"); *James v. Valtierra*, 402 U.S. 137, 141 (1971) ("[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice"). Review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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340 F.3d 583

United States Court of Appeals,
Eighth Circuit.

SOUTH DAKOTA FARM BUREAU, INC.;
South Dakota Sheep Growers Association, Inc.;
Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.;
Frank D. Brost; Donald
Tesch; William A. Aeschlimann; Spear H. Ranch, Inc.;
Marston Holben;
Marston and Marian Holben Family Trust;
Montana-Dakota Utilities Company;
Northwestern Public Service; Otter Tail Power Company,
Plaintiffs-Appellees,
v.
Joyce HAZELTINE, in her official capacity
as Secretary of State of
South Dakota; Mark W. Barnett, in his official
capacity as Attorney General of
South Dakota, Defendants-Appellants,
Dakota Rural Action; South Dakota Resources Coalition,
Intervenors Defendants,

State of Nebraska; Everett Holstein;
Rudy Meduna; Dan Hodges,
Amicus on Behalf of Appellants,

The American Farm Bureau Federation;
Alabama Farm Bureau Federation; Arkansas
Farm Bureau Federation; Kansas Farm Bureau
Federation; Kentucky Farm Bureau
Federation; Minnesota Farm Bureau Federation;
North Dakota Farm Bureau
Federation; Utah Farm Bureau Federation,
Amicus on Behalf of Appellees.

South Dakota Farm Bureau, Inc.; South Dakota
Sheep Growers Association, Inc.;

Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.;
Frank D. Brost; Donald Tesch;
William A. Aeschlimann; Spear H. Ranch, Inc.;
Marston Holben; Marston and Marian Holben
Family Trust; Montana-Dakota Utilities Company;
Northwestern Public Service; Otter Tail Power
Company, Plaintiffs-Appellees,

v.

Joyce Hazeltine, in her official capacity as
Secretary of State of South Dakota;
Mark W. Barnett, in his official capacity
as Attorney General of South Dakota, Defendants,
Dakota Rural Action;
South Dakota Resources Coalition, Intervenors
Defendants-Appellants,

Everett Holstein; Rudy Meduna; Dan Hodges,
Amicus on Behalf of Appellants.

South Dakota Farm Bureau, Inc.; South Dakota
Sheep Growers Association, Inc.;
Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.;
Frank D. Brost; Donald Tesch;
William A. Aeschlimann, Plaintiffs,
Spear H. Ranch, Inc.; Marston Holben;
Marston and Marian Holben Family Trust,
Plaintiffs-Appellants,
Montana-Dakota Utilities Company;
Northwestern Public Service; Otter Tail
Power Company, Plaintiffs,

v.

Joyce Hazeltine, in her official capacity
as Secretary of State of South
Dakota; Mark W. Barnett, in his official
capacity as Attorney General of
South Dakota, Defendants-Appellees,
Dakota Rural Action; South Dakota
Resources Coalition, Intervenors
Defendants-Appellees.

South Dakota Farm Bureau, Inc.; South Dakota Sheep Growers Association, Inc.; Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.; Frank D. Brost; Donald Tesch; William A. Aeschlimann, Plaintiffs-Appellants, Spear H. Ranch, Inc.; Marston Holben; Marston and Marian Holben Family Trust; Montana-Dakota Utilities Company; Northwestern Public Service; Otter Tail Power Company, Plaintiffs,

v.

Joyce Hazeltine, in her official capacity as Secretary of State of South Dakota; Mark W. Barnett, in his official capacity as Attorney General of South Dakota, Defendants-Appellees, Dakota Rural Action; South Dakota Resources Coalition, Intervenors Defendants-Appellees.

Nos. 02-2366, 02-2588, 02-2644, 02-2646.

Submitted: Feb. 10, 2003.
Filed: Aug. 19, 2003.
Rehearing and Rehearing En Banc Denied Oct. 31, 2003.*

Diane M. Best, argued, Pierre, SD (*Roxanne Giedd*, on the brief), for appellants Barnett and Hazeltine in 02-2366, 02-2644 and 02-2646.

Randy C. Canney, argued, Denver, CO, for intervenors South Dakota Resources and Dakota Rural Action in all cases.

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* Judge Wollman took no part in the consideration or decision of this matter.

David S. Day, argued, Vermillion, SD (*Richard O. Gregerson*, on the brief), for appellees Aeschlimann, Tesch, Brost, Sjovall Feedyard, Haverhals Feedlot, South Dakota Sheep Growers and South Dakota Farm Bureau in all cases.

David A. Gerdes, argued, Pierre, SD (Neil Fulton, on the brief), for appellees Otter Tail Power Co., Northwestern Public Service and Montana-Dakota Utilities Co. in all cases.

Before *BOWMAN, FAGG,* and MORRIS SHEPPARD ARNOLD, Circuit Judges.

BOWMAN, Circuit Judge.

The South Dakota Constitution prohibits corporations and syndicates, subject to certain exemptions, from acquiring or obtaining an interest in land used for farming and from otherwise engaging in farming in South Dakota. This restriction, known as Amendment E, was added to the South Dakota Constitution as the result of a 1998 referendum. The thirteen Plaintiffs in this case allege that Amendment E violates the dormant Commerce Clause of the United States Constitution, and a smaller group of these Plaintiffs also claims that it violates the Americans with Disabilities Act (ADA).

Prior to trial, the District Court dismissed the ADA claim, and the Plaintiffs amended their complaint to delete that claim. After a bench trial, but prior to issuing its opinion, the District Court sent a memorandum to all parties stating that it erred in dismissing the ADA claim before trial. In its opinion, the District Court concluded that Amendment E violates both the ADA and the dormant Commerce Clause, and it enjoined Defendants Joyce Hazeltine, the South Dakota secretary of state, and Mark

Barnett, the State's attorney general, from enforcing Amendment E. *S.D. Farm Bureau, Inc. v. Hazeltine,* 202 F.Supp.2d 1020 (D.S.D.2002). Hazeltine and Barnett appeal, as do two parties that intervened on the side of the Defendants, Dakota Rural Action and South Dakota Resources Council.

We conclude that the District Court improperly considered the ADA claim, but we affirm its judgment by concluding that Amendment E contravenes the dormant Commerce Clause.

I.

Amendment E was codified as four sections of Article XVII of the South Dakota Constitution. Section 21, the prohibitory provision, states that "[n]o corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." S.D. Const. art. XVII, § 21. A corporation or syndicate can avoid the prohibition of § 21 if it fits within one of fifteen exempted categories listed in § 22, five of which are relevant to the issues raised on appeal.

The first of these relevant exemptions is for a "family farm corporation or syndicate," which is defined as

> a corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family. The term, family, means natural persons related to one another within the fourth degree of kinship according to civil law, or their spouses. At least one of the family members in a family farm corporation or

> syndicate shall reside on or be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration.

Id. § 22, cl. 1. The ADA claim in this case is based on the inability of physically disabled farmers and ranchers to qualify for this exemption.

The second relevant exemption in § 22 applies to land and livestock in which a cooperative has a legal interest, so long as the cooperative fulfills certain prerequisites related to family ownership.[1] *Id.* cl. 2. As the District Court noted, this is a curious exemption because § 21, by its own terms, applies only to "corporations and syndicates" and not specifically to cooperatives.

Amendment E also contains an exemption known as a "grandfather clause" that applies to interests in agricultural land owned by corporations and syndicates as of the effective date of Amendment E. *Id.* cl. 4. Section 22 has a similar provision for livestock that corporations and

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[1] In full, the exemption applies to:

> [a]gricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock.

S.D. Const. art. XVII, § 22, cl. 2.

syndicates owned as of the effective date of Amendment E. *Id.* cl. 5. The final exemption of note is for corporations or syndicates that acquire or lease agricultural land for immediate or potential non-farming purposes. *Id.* cl. 10.

II.

Thirteen parties, to whom we will refer collectively as "the Plaintiffs," challenge the legality of Amendment E. Two of the Plaintiffs are South Dakota corporations: Haverhals Feedlot, Inc. (HFI), and Sjovall Feedyard, Inc. (SFI). Each owns a custom cattle feedlot, which means that they raise cattle owned by third parties. The third parties deliver cattle to the feedlots but retain ownership of the cattle. The feedlots then raise the cattle in preparation for slaughter. HFI and SFI claim that § 21 prohibits corporations who own cattle from contracting with South Dakota feedlots because the corporations would be engaging in farming in South Dakota. In short, these two Plaintiffs claim that Amendment E – if enforced – would put them out of business because they earn their revenue from feeding cattle owned by non-exempt entities.

Plaintiffs Donald Tesch and William Aeschlimann engage in unincorporated livestock feeding businesses in South Dakota. Tesch is in the seventh year of a ten-year contract to raise hogs for Harvest States Cooperative, which is based in Minnesota. Although the hogs Tesch is raising under this contract are exempted by Amendment E's grandfather clause for livestock, Tesch claims that § 21 bars Harvest States from engaging in farming in South Dakota and, therefore, from entering into a subsequent contract with him. As for Aeschlimann, he feeds lambs owned by third parties, many of whom are non-exempt

corporations pursuant to Amendment E. He thus claims that Amendment E will drastically reduce his income because it prohibits the non-exempt entities from contracting with him.

Spear H Ranch (Spear H), another corporate Plaintiff, is an Arizona corporation that does business in South Dakota, operating a cattle ranch. Its sole shareholder is the Marston and Marian Holben Family Trust, which is also a Plaintiff, as is Marston Holben individually. Spear H, the Holben Trust, and Holben claim that Amendment E prohibits Spear H from acquiring additional land in South Dakota and farming it because, aside from the grandfather clause, Spear H does not fit into any of § 22's exemptions. Specifically, the family farm exemption of § 22(1) cannot apply because the Holbens do not reside or work on the ranch.

Plaintiff Frank Brost is the majority or sole stakeholder in three entities, none of which are Plaintiffs, that own ranch land and livestock in South Dakota. The grandfather clause of Amendment E permits these entities to continue using the land they owned as of Amendment E's effective date, but Brost reads § 21 to prohibit them from owning additional land and from engaging in additional farming. Because Brost does not live on the ranch land, nor do any of his family members, he believes that the family farm corporation exemption of § 22(1) would not apply to his three businesses. In addition, Brost individually owns ranch land, and he claims that Amendment E has diminished the value of the land because its most likely purchasers are corporations that cannot acquire the land under Amendment E.

Two interest groups, on behalf of their members, have also joined as Plaintiffs. The first is the South Dakota Farm Bureau (SDFB), which represents the interests of farm, ranch, and rural families in South Dakota. It claims that Amendment E has damaged its members by prohibiting their limited liability entities from farming in South Dakota and by effectively preventing them from contracting with corporations and syndicates. The South Dakota Sheep Growers' Association similarly claims that many of its members cannot farm in corporate form or contract with certain entities.

The final three Plaintiffs are utility companies that claim Amendment E applies to, and increases the cost of, easements they must acquire for a power plant.

On the other side, two not-for-profit groups – Dakota Rural Action (DRA), which represents the interests of family farmers, and South Dakota Resources Council (SDRC), which advocates protection of the environment – intervened permissively, joining the South Dakota secretary of state and attorney general as Defendants. DRA and SDRC were both heavily involved in drafting Amendment E and promoting it during the campaign leading up to the referendum. We will refer to Hazeltine and Barnett as "the State Officials," to DRA and SDRC as "the Intervenors," and to all four parties collectively as "the Defendants."[2]

[2] The State Officials and the Intervenors filed separate briefs and had separate counsel at trial and on appeal.

III.

We first consider the ADA claim initially advanced only by SDFB, but later joined by Plaintiffs Brost and Holben. The family farm corporation exemption in § 22(1) requires a family member to reside on a farm or engage in "both daily or routine substantial physical exertion and administration." S.D. Const. art. XVII, § 22, cl. 1. The rationale supporting the ADA claim is that Amendment E discriminates against disabled farmers, such as Brost and Holben, whose corporations cannot qualify for this exemption because their owners are physically unable to participate in the daily labor and management of the land.

Eleven months before trial, the Defendants successfully moved to dismiss the ADA claim on the basis that a plaintiff cannot seek prospective injunctive relief for ADA claims from state officials in their official capacities. Hr'g Tr. at 5-6 (Jan. 18, 2000). The Plaintiffs then amended their complaint to remove the ADA claim. There was no mention of the ADA claim during the pre-trial conference or during the trial, which took place from December 3-7, 2001. On December 12, before the District Court issued its opinion, the District Court sent a memorandum to the parties explaining that, at the time of trial, it "was somewhat behind in [its] reading" of Eighth Circuit case law. Dist. Ct. Mem. to Counsel (Dec. 12, 2001). The District Court wrote that, on November 6, 2001, we concluded in *Grey v. Wilburn,* 270 F.3d 607, 609 (8th Cir.2001), that a plaintiff can indeed request prospective injunctive relief for ADA violations from state officials in their official

capacities.[3] The District Court wrote in its December 12 memorandum that its decision to dismiss the ADA claim was incorrect pursuant to *Grey,* and it directed the parties to "keep this in mind as you submit further arguments." Dist. Ct. Mem. to Counsel (Dec. 12, 2001).

On the basis of *Grey,* the District Court reconsidered the ADA claim and concluded that Amendment E violated the ADA. The Court explained its decision to rule on the ADA claim as proper because Brost and Holben submitted ADA claims as offers of proof at trial: they testified that they are unable to engage in strenuous ranching activities. Trial Tr. at 66, 255. The Defendants argue that the District Court abused its discretion by reinstating the ADA claim, while the Plaintiffs defend the District Court's sua sponte revival of the claim as a proper decision to conform the pleadings to the evidence at trial. *See* Fed.R.Civ.P. 15(b). The pleadings may only be amended when issues not in the pleadings are tried by the parties' "express or implied consent." *Id.* In order to consent to the trial of an unpleaded issue, a party must have notice of that issue and must have been given adequate opportunity to cure any surprise caused by the amendment to the pleadings. *Kim v. Nash Finch Co.,* 123 F.3d 1046, 1063 (8th Cir.1997). We review a district court's decision to conform the pleadings to the evidence for an abuse of discretion. *Clark v. Martinez,* 295 F.3d 809, 815 (8th Cir.2002).

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[3] *Grey* was not the first case in which we permitted a plaintiff to seek injunctive relief for an ADA violation from a state official in his or her official capacity. *See Gibson v. Ark. Dep't of Corr.,* 265 F.3d 718, 722 (8th Cir.2001).

The record contains no evidence that the Defendants expressly consented to the trial of the ADA claim, and we do not believe there is enough evidence to satisfy the demanding standard for implied consent. *See Triad Elec. & Controls, Inc. v. Power Sys. Eng'g, Inc.*, 117 F.3d 180, 193 (5th Cir.1997) (stating that "trial of unpled issues by implied consent is not lightly to be inferred under Rule 15(b)" (citation to quoted case omitted)). The offers of proof concerning the respective states of health of Brost and Holben cannot be considered notice to the Defendants that the ADA claim was being tried; the purpose of the offers of proof was never stated, and there is simply no basis for us to conclude that the Defendants impliedly consented to the trial of the ADA claim. It is significant to us that the District Court had dismissed the ADA claim and that the Plaintiffs deleted the ADA claim from their complaint; if the Defendants had any notice of the ADA claim, their notice was that the District Court would not permit the claim to be heard and that the Plaintiffs had no intent to try it. Moreover, the ADA was never discussed during trial. Without notice, the Defendants lacked an adequate opportunity to cure the surprise caused by the District Court's constructive amendment to the pleadings: they could not present evidence or cross-examine witnesses concerning any issue, factual or legal, related to the claim.

The Plaintiffs argue that the Defendants had an opportunity to cure the surprise because the District Court instructed the parties to address a potential ADA claim in their post-trial briefs. The purpose of Rule 15(b), however, is to ensure that the pleadings do not obstruct a court's ability to address the issues that were presented and defended at trial. In this case, the ADA claim was never presented or defended at trial, so it is immaterial that the

Defendants could defend the ADA claim in their post-trial briefs. We conclude that the District Court abused its discretion in constructively amending the pleadings to include the ADA claim. The judgment cannot stand insofar as it is based on that claim.[4]

IV.

Before we turn to the dormant Commerce Clause claim, we must first address the State Officials' argument that the Plaintiffs lack standing to raise this claim. We "are under an independent obligation to examine [our] own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (quoting *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)) (first alteration by this Court). If a plaintiff lacks standing, a court is without subject matter jurisdiction. *Faibisch v. Univ. of Minn.,* 304 F.3d 797, 801 (8th Cir.2002). Whether a court has subject matter jurisdiction is an issue that any party or the court may raise at any time. *Fromm v. Comm'n of Veterans Affairs,* 220 F.3d 887, 890 (8th Cir.2000).

To establish standing, a plaintiff must show three things. "First, the plaintiff must have suffered an injury in

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[4] The District Court also justified its reconsideration of the ADA claim on the ground that SDFB had associational standing to bring the ADA claim. *S.D. Farm Bureau, Inc. v. Hazeltine,* 202 F.Supp.2d 1020, 1039 (D.S.D.2002). The issue of SDFB's standing, however, is irrelevant to Rule 15(b) analysis. The question is not whether one of the Plaintiffs was constitutionally and prudentially entitled to raise the ADA claim at trial, but rather whether the claim was in fact raised and actually tried.

fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks and citations to quoted cases omitted). Second, the injury must be traceable to the defendant's challenged action. *Id.* Third, it must be "likely" rather than "speculative" that a favorable decision will redress the injury. *Id.* at 561, 112 S.Ct. 2130. The standing challenge in this case concerns the first element: whether any of the Plaintiffs have suffered an injury in fact.

The Defendants insist that HFI, SFI, Tesch, and Aeschlimann lack standing because the prohibitions of § 21 apply only to their contracting partners. A third party does not have standing to assert "the rights or legal interests of others in order to obtain relief from injury to themselves." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County,* 115 F.3d 1372, 1379 (8th Cir.) (quoting *Warth v. Seldin,* 422 U.S. 490, 509, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)), *cert. denied,* 522 U.S. 1029, 1036, 118 S.Ct. 629, 139 L.Ed.2d 609 (1997). But "[i]n Commerce Clause jurisprudence, cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate." *Houlton Citizens' Coalition v. Town of Houlton,* 175 F.3d 178, 183 (1st Cir.1999). For example, in *General Motors Corp. v. Tracy,* 519 U.S. 278, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997), an Ohio statute charged out-of-state natural gas vendors at a higher sales tax rate than certain in-state vendors. Although General Motors was not an out-of-state natural gas vendor, it had standing to challenge the statute's constitutionality because it was financially injured; its Ohio manufacturing facility purchased virtually all of its natural gas from out-of-state suppliers, which

had passed on the cost of the higher Ohio tax rate to its customers. *Id.* at 286, 117 S.Ct. 811. HFI, SFI, Tesch, and Aeschlimann are similarly situated: they do substantial business with out-of-state corporations affected by the challenged law. Their imminent loss of that business as a result of Amendment E's enforcement satisfies the injury-in-fact requirement of standing. *See Clinton v. City of New York,* 524 U.S. 417, 431, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (concluding party had shown sufficient injury because defendant's action had a negative effect on party's "borrowing power, financial strength, and fiscal planning"); *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (stating that injury may be actual or imminent to satisfy standing); *Ben Oehrleins,* 115 F.3d at 1379 (finding sufficient injury-in-fact in suit against county where county ordinance prohibited plaintiffs from gaining access to market); *Lepelletier v. FDIC,* 164 F.3d 37, 42 (D.C.Cir.1999) (noting court had previously held that denial of business opportunity can satisfy injury requirement).[5]

[5] We note that the Defendants also argued that Tesch cannot show an injury because they do not read Amendment E to bar Harvest States from engaging in farming in Scuth Dakota. Were we to apply the canon of *expresio unius est exclusio alterius,* we could interpret § 21 not to apply to cooperatives because § 21 does not list cooperatives. Section 22(2), however, exempts certain types of cooperatives from the restrictions of § 21. This exemption would be meaningless unless cooperatives were subject to § 21. Therefore, in order to avoid construing § 22(2) as being mere surplusage, we interpret § 21 to restrict cooperatives in the same way that it does corporations and syndicates. *See United States v. Gomez-Hernandez,* 300 F.3d 974, 979 (8th Cir.2002), *cert. denied,* 537 U.S. 1138, 123 S.Ct. 929, 931, 154 L.Ed.2d 831 (2003).

Because we conclude that HFI, SFI, Tesch, and Aeschlimann have standing, we need not verify the independent standing of the other Plaintiffs, for they all raise similar arguments for affirmance. *See Clinton,* 524 U.S. at 432 n. 19, 118 S.Ct. 2091; *Houlton,* 175 F.3d at 183.

V.

The District Court held that Amendment E violates the dormant Commerce Clause. We review this conclusion of law de novo. *See R & M Oil & Supply, Inc. v. Saunders,* 307 F.3d 731, 734 (8th Cir.2002).

A.

The Plaintiffs contend that Amendment E violates the so-called dormant Commerce Clause of the United States Constitution. The Commerce Clause, of course, grants Congress the authority to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause is the negative implication of the Commerce Clause: states may not enact laws that discriminate against or unduly burden interstate commerce. *Quill Corp. v. North Dakota,* 504 U.S. 298, 312, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). The recognition of the dormant Commerce Clause carries out "the Framers' purpose to 'preven[t] a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'" *Fulton Corp. v. Faulkner,* 516 U.S. 325, 330-31, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996) (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 180, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995))

(alteration in *Fulton Corp.*). The vision of the Framers was that "every farmer . . . shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949).

A state law that is challenged on dormant Commerce Clause grounds is subject to a two-tiered analysis. First, the court considers whether the challenged law discriminates against interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). Discrimination in this context refers to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* If Amendment E is indeed discriminatory, it is "*per se* invalid" unless the Defendants "can demonstrate, under rigorous scrutiny, that [they have] no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 392, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). If the law is not discriminatory, the second analytical tier provides that the law will be struck down only if the burden it imposes on interstate commerce "is clearly excessive in relation to its putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The Plaintiffs argue that Amendment E cannot survive scrutiny under either test; that is, they argue that Amendment E impermissibly discriminates against interstate commerce and also fails the *Pike* balancing test.

In the first tier of analysis, the Supreme Court has recognized three indicators of discrimination against out-of-state interests. First, discrimination can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose. *Bacchus Imports, Ltd. v.*

Dias, 468 U.S. 263, 270, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). Alternatively, a law could facially discriminate against out-of-state interests. *See, e.g., Chem. Waste Mgmt. v. Hunt,* 504 U.S. 334, 342, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992). Third, even if a state law responds to legitimate local concerns and is not discriminatory either in its purpose or on its face, the law could discriminate arbitrarily against interstate commerce, that is, it could have a discriminatory effect. *Maine v. Taylor,* 477 U.S. 131, 148 n. 19, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). The Plaintiffs assert that Amendment E satisfies all three discrimination tests, but we rest our conclusion on the evidence in the record of a discriminatory purpose underlying Amendment E. As a result, we do not consider the other two tests, or the second tier analysis, the *Pike* balancing test.

The Plaintiffs have the burden of proving discriminatory purpose, *see Hughes v. Oklahoma,* 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), and can look to several sources to meet that burden. The most obvious would be direct evidence that the drafters of Amendment E or the South Dakota populace that voted for Amendment E intended to discriminate against out-of-state businesses. *See SDDS, Inc. v. South Dakota,* 47 F.3d 263, 268 (8th Cir.1995). The record contains a substantial amount of such evidence as regards the drafters, the most compelling of which is the "pro" statement on a "pro-con" statement compiled by Secretary of State Hazeltine and disseminated to South Dakota voters prior to the referendum. *See* Constitutional Amendment E: Attorney General Explanation. Submitted by Charlie Johnson and Dennis Wiese – co-chairmen of the organization responsible for Amendment E's promotion (Wiese was a drafter of Amendment E)

– the "pro" statement informed voters that, without the passage of Amendment E, "[d]esperately needed profits will be skimmed out of local economies and into the pockets of distant corporations." *Id.* Further language from the "pro" statement explains that "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations." *Id.* We interpret the "pro" statement to be "brimming with protectionist rhetoric." *See SDDS*, 47 F.3d at 268.

Notes from the Amendment E drafting meetings provide additional direct evidence of the drafters' intent to discriminate against out-of-state businesses. Nancy Thompson, who was involved in the drafting, testified that Murphy Family Farms and Tyson Foods, two out-of-state corporations, were proposing to build hog farming facilities in South Dakota and that Amendment E's supporters wanted "to get a law in place to stop them." Trial Tr. at 244. At a meeting on March 14, 1997, discussions were held concerning the best way to combat Tyson, Murphy, and others. Draft Hog Meeting Minutes (Mar. 14, 1997). A memorandum from April 28, 1997, from John Bixler, director of DRA, to participants from an April 21 meeting stated, in reference to a discussion at the April 21 meeting, that "[m]any have commented that just as they do not want Murphys and Tysons walking all over them, they don't want Farmland or Minnesota Corn Producers walking over them . . . either." Memorandum from John Z. Bixler at 4 (Apr. 28, 1997). These comments concern the drafters' desire to prohibit out-of-state cooperatives, in addition to corporations, from farming in South Dakota. We also note that the planning meetings that led to

Amendment E were known as the "hog meetings." Trial Tr. at 370; *see also* Draft Hog Meeting Minutes (Mar. 14, 1997). Again, this is a specific reference to the out-of-state corporations who enter into contracts with South Dakota farmers to raise hogs. Even more blatant was the remark at trial by Wiese that Amendment E was at least motivated in part by "the Murphy hog farm unit [in North Carolina] and what its [sic] done to the environment." Trial Tr. at 659.

As for indirect evidence of discriminatory purpose, irregularities in the drafting process can hint at such a purpose. *See SDDS,* 47 F.3d at 269. Our concern in this case about the drafting process is the information used by the drafters. In this case, the record leaves a strong impression that the drafters and supporters of Amendment E had no evidence that a ban on corporate farming would effectively preserve family farms or protect the environment, and there is scant evidence in the record to suggest that the drafters made an effort to find such information.

The testimony of Mary Luanne Napton, executive director of SDRC and secretary of the Amendment E drafting committee, illuminates this point. Napton, a "registered environmental professional," Trial Tr. at 348, testified that she was unfamiliar with all of South Dakota's environmental regulations at the time Amendment E was drafted. *Id.* at 386. She nevertheless believed that Amendment E would be necessary even if the State's current environmental regulations were enforced. *Id.* at 387. Her rationale was that "personal responsibility" was the best way to ensure regulatory compliance, suggesting that family-owned farms would accept responsibility where corporate-owed farms would not. *Id.* We recognize

the argument that an individual farmer could have greater incentive than a limited liability entity to avoid wrongdoing, but we believe that if the drafters were seriously concerned with long-term environmental hazards, as Napton claimed she was, they would have made it a point to learn of the effects of current regulations. It is especially disconcerting that Napton – who has also spent ten years lobbying the legislature for new environmental regulations – could not explain the present and future effects of the current environmental laws. If she lacked this information, we can presume that the entire committee did, too.[6]

The record contains even less evidence that the drafters considered how Amendment E would affect the economic viability of family farmers. The drafters relied on studies that correlated industrialized farming with higher levels of poverty. There is no evidence in the record, however, that they utilized or commissioned any economic forecasts as to the effect of wholly shutting out corporate entities from farming in South Dakota. Even when an expert contacted by a member of the drafting committee inquired whether it was a good idea to create such "complete" barriers to capital flow into the state, Comments on

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[6] The Defendants do not, of course, bear the burden of disproving a discriminatory purpose, but they almost certainly would have introduced any evidence used by the drafting committee that compared the potential impact that Amendment E would have on the environment with enhanced enforcement of current environmental regulations; such evidence is highly relevant to the "per se" invalidity test of the first tier of dormant Commerce Clause analysis as well as to measuring Amendment E's benefit for the purposes of the *Pike* balancing test of the second tier.

YSD Proposed Constitutional Amendment ¶ 7, the committee charged forward without hesitation, *see* Trial Tr. at 420. Our point here is not to adopt one economic theory or another, but rather to emphasize that no study or forecast was commissioned to evaluate any theories. We believe that this lack of information serves as indirect evidence of the drafters' intent to create a law specifically targeting out-of-state businesses, which the drafters viewed as the sole cause of the perils facing family farmers and a leading potential cause of environmental damage. Another source of evidence from the drafting process supports this inference: a member of the drafting committee admitted that the committee completed the drafting process quickly because its members wanted to prevent Tyson Foods and Murphy Family Farms from building facilities in South Dakota. Trial Tr. at 244-45.

Whether Amendment E would protect family farmers and the environment is unknown. It would be reasonable to surmise that the less information concerning the potential impact of Amendment E that the drafters had, the less likely that Amendment E would actually be an effective remedy for the problems it was purportedly designed to address. A low probability of effectiveness can be indirect evidence of discriminatory purpose. *SDDS,* 47 F.3d at 268-69; *see also Pete's Brewing Co. v. Whitehead,* 19 F.Supp.2d 1004, 1016 (W.D.Mo.1998) (resting discriminatory intent conclusion partially on determination that statute at issue did little to advance its purported purpose). But more importantly, we believe, the evidence in the record demonstrates that the drafters made little effort to measure the probable effects of Amendment E and of less drastic alternatives. We are thus left, like the South Dakota

populace that voted on Amendment E, without any evidence as to the law's potential effectiveness. That the drafting committee and the voters were without such evidence supports the conclusion compelled by the direct evidence: the intent behind Amendment E was to restrict in-state farming by out-of-state corporations and syndicates in order to protect perceived local interests. Such an intent bespeaks of "the economic protectionism that the Commerce Clause prohibits." *See W. Lynn Creamery v. Healy,* 512 U.S. 186, 205, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

In concluding that Amendment E was motivated by a discriminatory purpose, we are cognizant of the argument that discerning the purpose of a constitutional provision is an impossible exercise. In the view of the District Court, "It would be impossible . . . to ascertain the intentions of the thousands of citizens of South Dakota who voted for Amendment E. We do not have here a factual scenario of elected delegates to a constitutional convention where a record is kept of all proceedings." *S.D. Farm Bureau,* 202 F.Supp.2d at 1028. We do, however, have evidence of the intent of individuals who drafted the amendment that went before the voters. It is clear that those individuals had a discriminatory purpose. *See SDDS,* 47 F.3d at 267. Discriminatory purpose is at the heart of dormant Commerce Clause analysis and is often incorporated into both first-tier analysis and second-tier *Pike* balancing analysis. *See, e.g., Fulton Corp.,* 516 U.S. at 330, 116 S.Ct. 848 (explaining dormant Commerce Clause as a prohibition on state regulations designed with the purpose of benefitting in-state interests by burdening out-of-state interests); *W. Lynn Creamery,* 512 U.S. at 196, 114 S.Ct. 2205 (noting

purpose of state's unconstitutional pricing scheme although resting decision on statute's discriminatory effect); *Taylor,* 477 U.S. at 148, 106 S.Ct. 2440 (equating purposeful economic protectionism with per se invalidity).[7] Although the Supreme Court has not laid out a specific test for determining discriminatory purpose,[8] we are guided by precedent in selecting the types of evidence on which we have relied to reach our conclusion. *See Waste Mgmt. Holdings, Inc. v. Gilmore,* 252 F.3d 316, 336 (4th Cir.2001) (analyzing "historical background of and specific sequence of events leading up to" challenged state action to find discriminatory purpose), *cert. denied,* 535 U.S. 904, 122 S.Ct. 1203, 152 L.Ed.2d 142 (2002); *SDDS,* 47 F.3d at 268 (relying in part on referendum pamphlet to find discriminatory purpose); *cf. Cmty. for Creative Non-Violence v. Reid,* 490 U.S. 730, 743-46, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) (analyzing statements by drafters of statute in determining proper reading – i.e., purpose – of copyright statute). The evidence in this case leads to a single conclusion: Amendment E was motivated by a discriminatory purpose.

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[7] *See also* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause,* 84 Mich. L Rev. 1091, 1206-1233 (1986) (presenting and defending thesis that Supreme Court's dormant Commerce Clause analysis is driven by desire to prevent purposeful protectionism).

[8] *See, e.g.,* Julian Cyril Zebot, Note, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce,* 86 Minn. L.Rev. 1063, 1077-84 (2002) (cataloging and critiquing non-uniform discriminatory purpose analyses by federal courts of appeal).

B.

Because we conclude that Amendment E was motivated by a discriminatory purpose, we must strike it down as unconstitutional unless the Defendants can demonstrate that they have no other method by which to advance their legitimate local interests. *See C & A Carbone,* 511 U.S. at 392, 114 S.Ct. 1677. The Supreme Court has referred to this test as one of the "strictest scrutiny." *Or. Waste Sys.,* 511 U.S. at 101, 114 S.Ct. 1345. The Defendants emphasize the legitimacy of their interests, which we can generally state to be the promotion of family farms and the protection of the environment. We have previously concluded that promoting family farms is a legitimate state interest, *see MSM Farms, Inc. v. Spire,* 927 F.2d 330, 333 (8th Cir.) (finding purpose legitimate in Equal Protection Clause analysis), *cert. denied,* 502 U.S. 814, 112 S.Ct. 65, 116 L.Ed.2d 40 (1991), and the purpose of environmental protection is equally legitimate. The focus of this test of the "strictest scrutiny," however, does not concern the strength of the interests advanced by the challenged law. Rather, the question is whether reasonable nondiscriminatory alternatives exist to advance the interests. The Defendants bear the burden of demonstrating there is no such alternative. *Or. Waste Sys.,* 511 U.S. at 100-01, 114 S.Ct. 1345.

We cannot say with certainty that any alternative will ultimately succeed in meeting the goals of Amendment E because we are "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them." *See Tracy,* 519 U.S. at 308, 117 S.Ct. 811. Our inability to make these determinations explains why the Defendants, who should have the capability to provide economic and environmental

forecasts, have the burden of proving that no non-discriminatory alternative exists. Although the record contains evidence linking industrial farming with poverty and environmental problems, it contains no evidence that suggests, evaluates, or critiques alternative solutions.

While we are loath to propose alternatives, we believe several could be found in a 1998 report introduced by the Defendants called "A Time to Act," a report commissioned by the federal government and addressed to the United States Department of Agriculture that lays out the case for regulations that favor family farms. *See A Time to Act: A Report of the USDA National Comm'n on Small Farms* (1998). Although the recommendations in the Report relate to federal policy and legislation, in many cases those recommendations are applicable to the states, as well. For example, the State could implement an initiative to optimize the labor and resources of small farm operators. *See id.* at 10. Second, the State could create an oversight process to regulate contracts between corporations and syndicates and South Dakota farmers. *See id.* at 62-63. In addition, to the extent environmental waste from hog farms is a concern, the State could introduce stricter environmental regulations or could more aggressively enforce its current environmental laws. *See* Trial Tr. at 659-60. Finally, in an effort to decrease the concentration of livestock in feed lots and the like, the State could set limits on the number of livestock that could be fed in a particular area by a farmer regardless of how the farmer organizes his or her business.

Regardless of the potential effects of any of these alternatives, the Defendants have failed to meet the high burden of demonstrating their ineffectiveness. Because Amendment E has a discriminatory purpose, and because

the Defendants have not satisfied their burden of showing that non-discriminatory alternatives would not advance Amendment E's interests, we must conclude that Amendment E violates the dormant Commerce Clause.[9]

VI.

Amendment E violates the dormant Commerce Clause. Accordingly, we affirm the order of the District Court enjoining its enforcement.

[9] As we decide this case based upon the first tier of dormant Commerce Clause analysis, we need not discuss the *Pike* balancing test.

202 F.Supp.2d 1020

United States District Court,
D. South Dakota,
Central Division.

SOUTH DAKOTA FARM BUREAU, INC., South Dakota Sheep Growers Association, Inc., Haverhals Feedlot, Inc., Sjovall Feedyard, Inc., Frank D. Brost, Donald Tesch, William A. Aeschlimann, Spear H Ranch, Inc., Marston Holben, Marston and Marion Holben Family Trust, Montana-Dakota Utilities Co., Northwestern Public Service, and Otter Tail Power Company, Plaintiffs,

v.

Joyce HAZELTINE, in her official capacity as Secretary of State of South Dakota and Mark W. Barnett, in his official capacity as Attorney General of South Dakota, Defendants. Dakota Rural Action and South Dakota Resources Coalition, Defendant-Intervenors.

No. CIV. 99-3018.

May 17, 2002.

Richard O. Gregerson, Susan M. Sabers, Woods, Fuller, Shultz & Smith, Sioux Falls, SD, *Thomas P. Tonner*, Tonner, Tobin & King, Aberdeen, SD, *David S. Day*, U.S.D. School of Law, Vermillion, SD, *David A. Gerdes*, Neil K. Fulton, May, Adam, Gerdes & Thompson, Pierre, SD, for Plaintiffs.

Mark W. Barnett, Roxanne Giedd, Lawrence E. Long, Diane M. Best, Attorney General's Office, Pierre, SD, for Defendants.

John H. Davidson, Jr., U.S.D. School of Law, Vermillion, SD, *James Jay Tutchton*, University of Denver, Denver, CO, *Randy Canney*, Denver, CO, for Defendant-Intervenors.

MEMORANDUM OPINION

KORNMANN, District Judge.

INTRODUCTION

[¶ 1] Plaintiffs seek declaratory and injunctive relief, challenging the constitutionality of the 1998 initiated amendments to Article XVII of the South Dakota Constitution, specifically Sections 21 through 24 (known as and hereinafter referred to as "Amendment E" because of its placement on the general election ballot when enacted by the voters of South Dakota). Amendment E in general prohibits limited liability business enterprises from acquiring real estate used for farming and from engaging in farming in South Dakota. Farming includes for the purposes of this action ranching as well. The specific claims are that the amendments are in violation of the United States Constitution, namely the Commerce Clause (more particularly the dormant Commerce Clause), the Equal Protection Clause, the Contracts Clause, the Supremacy Clause, and the Americans With Disabilities Act ("ADA"). This Court has jurisdiction over the subject matter and over the parties. *See* 28 U.S.C. § 1331.

[¶ 2] Being called upon to decide whether certain provisions of the South Dakota Constitution violate the United States Constitution is a heavy burden and one the court does not relish or take lightly. Certain general principles of law must be applied in the necessary analysis. There is a strong presumption of constitutionality as to these provisions. Unless unconstitutional on its face, there must be a clear showing of arbitrariness and irrationality or clear conflict with the United States Constitution. Plaintiffs

bear a heavy burden. There are legitimate state interests or purposes in seeking to prevent further concentrations of agricultural land and the production of food and animals from such land, seeking to prevent in the future agricultural land and production of animals and crops from passing into the hands of limited liability entities to the detriment of traditional family farm units and family farm limited liability entities primarily engaged in farming or ranching, and seeking to protect family life and values. South Dakota may make reasonable distinctions between business entities. Limited liability entities exist, if at all, by virtue of state laws permitting the use of such entities. States may decide legitimately to permit no limited liability entities. If Amendment E is susceptible of a reasonable interpretation which supports the constitutionality, the court must accord the measure that meaning. The court is not to adopt a strained, impractical, or absurd result, if possible. Federal judges are not, of course, "super legislatures." Some of these general principles will be discussed later with appropriate references to legal authority.

[¶ 3] § 21 of Article XVII of the South Dakota Constitution provides:

> No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming. The term, corporation, means any corporation organized under the laws of any state of the United States or any country. The term, syndicate, includes any limited partnership, limited liability partnership, business trust, or limited liability company organized under the laws of any state of the United States or any country. A syndicate

> does not include general partnerships, except general partnerships in which nonfamily (sic) farm syndicates or nonfamily (sic) farm corporations are partners. The term, farming, means the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products.

[¶ 4] § 22 of Article XVII of the South Dakota Constitution provides:

> The restrictions in § 21 of Article XVII do not apply to:
>
> (1) A family farm corporation or syndicate. A family farm corporation or syndicate is a corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family. The term, family, means natural persons related to one another within the fourth degree of kinship according to civil law, or their spouses. *At least one of the family members in a family farm corporation or syndicate shall reside on or be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration.* None of the corporation's or syndicate's partners, members, or stockholders may be nonresident aliens, or other corporations or syndicates, unless all of the stockholders, members, or partners of such

entities are persons related within the fourth degree of kinship to the majority of partners, members, or stockholders in the family farm corporation or syndicate; (emphasis supplied)

(2) Agricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock; So a corporation may own real estate which is used for the keeping and feeding of livestock if the livestock so fed and kept on that real estate is owned by a qualified cooperative.

(3) Nonprofit corporations organized under state nonprofit corporation law;

(4) Agricultural land, which, as of the approval date of this amendment, is being farmed, or which is owned or leased, or in which there is a legal or beneficial interest, directly or indirectly owned, acquired, or obtained by a corporation or syndicate, if such land or other interest is held in continuous ownership or under continuous lease by the same such corporation or syndicate. For the purposes of this exemption, land purchased

on a contract signed as of the approval date of this amendment is considered as owned on that date;

(5) Livestock, which as of the approval date of this amendment, is owned by a corporation or syndicate. For the purposes of this exemption, livestock to be produced under contract for a corporation or syndicate are considered as owned, if the contract is for the keeping or feeding of livestock and is signed as of the approval date of this amendment, and if the contract remains in effect and is not terminated by either party to the contract. This exemption does not extend beyond the term of any contract signed as of the approval date of this amendment;

(6) A farm operated for research or experimental purposes, if any commercial sales from the farm are only incidental to the research or experimental objectives of the corporation or syndicate;

(7) Land leases by alfalfa processors for the production of alfalfa;

(8) Agricultural land operated for the purpose of growing seed, nursery plants, or sod;

(9) Mineral rights on agricultural land;

(10) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential nonfarming (sic) purposes, for a period of five years from the date of purchase. A corporation or syndicate may hold such agricultural land in such acreage as may be necessary to its nonfarm (sic) business operation, but pending the development of the

agricultural land for nonfarm (sic) purposes, such land may not be used for farming except under lease to a family farm corporation or family farm syndicate or a non syndicate or noncorporate (sic) farm;

(11) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and may not be used for farming before being disposed of, except under a lease to a family farm corporation or syndicate, or a nonsyndicate (sic) or noncorporate (sic) farm. Any livestock so acquired shall be disposed of within six months;

(12) Agricultural lands held by a state or nationally chartered bank as trustee for a person, corporation or syndicate that is otherwise exempt from the provisions of §§ 21 to 24, inclusive, of Article XVII;

(13) A bona fide encumbrance taken for purposes of security;

(14) Custom spraying, fertilizing, or harvesting;

(15) Livestock futures contracts, livestock purchased for slaughter within two weeks of the purchase date, or livestock purchased and resold within two weeks.

[¶ 5] § 23 of Article XVII of the South Dakota Constitution provides:

> If a family farm corporation or family farm syndicate that has qualified under all the requirements of a family farm corporation or a family farm syndicate ceases to meet the defined criteria, it has twenty years, if the ownership of the majority of the stock of such corporation, or the majority of the ownership interest of such syndicate, continues to be held by persons related to one another within the fourth degree of kinship or their spouses, and their land holdings are not increased, to either requalify (sic) as a family farm corporation or family farm syndicate or dissolve and return to personal ownership.

[¶ 6] § 24 of Article XVII of the South Dakota Constitution provides:

> Any corporation or syndicate that owns agricultural land or engages in farming is required to report information necessary for the enforcement of §§ 21 to 24, inclusive, of Article XVII to the secretary of state on an annual basis, under rules promulgated by the secretary pursuant to state law. The secretary of state shall monitor such reports and notify the attorney general of any possible violations, and any resident of the state may also notify the attorney general of any possible violations. If a corporation or syndicate violates any provision of §§ 21 to 24, inclusive, of Article XVII, the attorney general shall commence an action in circuit court to enjoin any pending illegal purchase of land or livestock, or to force divestiture of land or livestock held in violation of §§ 21 to 24, inclusive, of Article XVII. The court shall order any land held in violation of §§ 21 to 24, inclusive, of Article XVII to be divested within two years and any livestock to be divested within six months. If land so ordered by

> the court has not been divested within two years, the court shall declare the land escheated to the state. If the attorney general fails to bring an action in circuit court to enforce §§ 21 to 24, inclusive, of Article XVII, any resident of the state has standing in circuit court to sue for enforcement.

[¶ 7] Having set forth the language of Amendment E, the court will now describe what the measure provides, what it does not provide, and what rules of law must be applied. The language used, almost without exception, is not ambiguous and therefore must be read and applied to the extent it is clearly written. This is not to say, as will hereinafter appear, that all portions of Amendment E are internally consistent. They are not. In fact, some provisions are hopelessly internally inconsistent and this complicates any reading and understanding of Amendment E.

[¶ 8] "It is a basic rule of statutory interpretation . . . that a statute which is clear and unambiguous on its face is not subject to construction." *Northwest Paper Co. v. Federal Power Commission,* 344 F.2d 47, 50 (8th Cir. 1965), (citing *Blair v. City of Chicago,* 201 U.S. 400, 26 S.Ct. 427, 50 L.Ed. 801 (1906); *Kansas City, Missouri v. Federal Pacific Electric Co.,* 310 F.2d 271, 273, 274 (8th Cir. 1962), and 2 Sutherland, Statutory Construction, 334 § 4702 (3rd Ed.1943)). "When the language of a statute is clear, certain, and unambiguous, there is no occasion for construction, and the court's only function is to declare the meaning of the statute as clearly expressed in the statute." *American Meat Institute v. Barnett,* 64 F.Supp.2d 906, 915 (D.S.D.1999), (quoting *South Dakota Subsequent Injury Fund v. Casualty Reciprocal Exchange,* 1999 SD 2, ¶ 17, 589 N.W.2d 206, 209 (1999), (quoting *Delano v. Petteys,* 94

SDO 700, 520 N.W.2d at 608), (quoting in turn *Petition of Famous Brands Inc.,* 347 N.W.2d at 884-85))).

> The South Dakota Supreme Court has "repeatedly stated that when the terms of a statute are clear, certain and unambiguous in their meaning, it is the function of the court to give them effect and not to amend the statute to avoid or produce a particular result." *S.D.E.A. v. Barnett,* 1998 SD 84, ¶ 57, 582 N.W.2d 386, 399 (Zinter, Judge, concurring in part, dissenting in part) (quoting *Matter of Sales Tax Refund Applications,* 298 N.W.2d 799, 802 (S.D.1980)). "'Unless exceptional circumstances dictate otherwise,' judicial inquiry into the meaning of a statute is complete once the Court finds that the terms of the statute are unambiguous." *S.D.E.A. v. Barnett,* 1998 SD 84, ¶ 57, 582 N.W.2d 386, 399 (Zinter, Judge, concurring in part, dissenting in part) (quoting *Burlington No. R. Co. v. Okla. Tax Comm'n,* 481 U.S. 454, 461, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404, 412 (1987)).

American Meat Institute v. Barnett, 64 F.Supp.2d at 915. Canons of statutory construction, when properly applied, are useful tools but are only aids to judicial interpretation which should not be applied when there is no ambiguity. *United States v. Vig,* 167 F.3d 443, 448 (8th Cir. 1999).

> Unless exceptional circumstances dictate otherwise, when the terms of a statute are unambiguous, judicial inquiry is complete. *See In re Erickson Partnership,* 856 F.2d 1068, 1070 (8th Cir. 1988). "We ask not what the Congress means; we ask only what the statute means." *United States v. Hepp,* 656 F.2d 350, 353 (8th Cir. 1981); *see, e.g., Northern States Power Co. v.*

> *United States,* 73 F.3d 764, 766 (8th Cir. 1996) (stating that when "statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative").
>
> *United States v. Vig,* 167 F.3d at 448.

[¶ 9] In the present case, provisions that would normally be statutory have been written into the South Dakota Constitution. The rules set forth above and other rules of statutory construction apply to readings of language in a state constitution as well. See, *e.g. State v. Neville,* 346 N.W.2d 425, 428 (S.D.1984), *In re Janklow,* 530 N.W.2d 367, 370 (S.D.1995) (citing *Levasseur v. Wheeldon,* 79 S.D. 442, 112 N.W.2d 894 (S.D.1962)), and *Cid v. South Dakota Dept. of Social Services,* 1999 SD 108, 598 N.W.2d 887 (SD 1999).

[¶ 10] Since it is clear that Amendment E is patterned to some extent from what was done in the Nebraska Constitution, the Nebraska provisions (upheld by the Nebraska Supreme Court and by the United States Court of Appeals for the Eighth Circuit but on much more narrow grounds than are presented here) will be compared with the South Dakota provisions as the court proceeds with the analysis.

> [I]t is an established rule of statutory construction that the adoption of a statute previously in force in some other jurisdiction is presumed to be the adoption of the interpretation thereof which had been theretofore placed upon it by the judicial tribunal whose duty it was to construe it. Black, Interpretation of Laws, p. 159, Sec. 70; *McDonald v. Hovey,* 110 U.S. 619, 628, 4 S.Ct.

142, 28 L.Ed. 269; *Sanger v. Flow,* 1 C.C.A. 56, 58, 48 F. 152, 154; *Blaylock v. Incorporated Town of Muskogee,* 54 C.C.A. 639, 117 F. 125.

Harrill v. Davis, 168 F. 187, 198 (8th Cir. 1909). This rule applies, of course, only to the extent that the South Dakota language tracks what was done in Nebraska and only to the extent that the language was interpreted as a matter of statutory construction.

[¶ 11] Section 21 of Article XVII is very broad. It prohibits any corporation or syndicate from (1) acquiring or otherwise obtaining an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in South Dakota, or (2) engaging in farming. These prohibitions are as broad as possible as to corporations and syndicates.

[¶ 12] The court will analyze the first prohibition. Thus, "no corporation or syndicate" may, as to real estate "used for farming" in South Dakota (unless exempted by Section 22 of Article XVII) own it, lease it, acquire an easement, acquire an option, acquire a mineral interest, acquire a security interest or mortgage, acquire a statutory lien, acquire a contract for deed interest, become a beneficiary under a trust, or record a declaration of taking for purposes of eminent domain (SDCL 21-35 and SDCL 31-19).

[¶ 13] A corporation is defined in Amendment E as "any corporation" organized under the laws of any state or any country. This clearly covers not only business corporations but, unless otherwise specifically exempted, municipal corporations, nonprofit corporations, foreign business corporations, business development corporations (SDCL Chapter 47-10), local industrial development corporations

(SDCL 5-14-22 and 5-14-23), community development corporations (SDCL 51A-4-20 and 51A-4-20.1), medical corporations, medical service corporations, chiropractic corporations, optometric corporations, podiatric corporations, physician's assistants corporations, nursing corporations, dental corporations, veterinary corporations, health care corporations, professional corporations for the practice of law, professional corporations for the practice of public accounting, professional corporations for the practice of engineering, architecture, or surveying, and cemetery corporations.

[¶ 14] We know that South Dakota, even when the legislature acts, has no legislative history to help guide courts. The intent of one or more members of the legislature is without legal significance in South Dakota. This includes the legislator or legislators who drafted or sponsored the legislation. Likewise, the intentions of the drafters of Amendment E or those who promoted it are without legal significance. It would be impossible, of course, to ascertain the intentions of the thousands of citizens of South Dakota who voted for Amendment E. We do not have here a factual scenario of elected delegates to a constitutional convention where a record is kept of all proceedings.

[¶ 15] "Syndicate" is defined in Amendment E as including any limited partnership, limited liability partnership, business trust (and the court notes that a business trust was defined by SDCL 47-14-1 at the time Amendment E was adopted, which definition has been revised and significantly broadened effective July 1, 2001, by SDCL 47-14A-1 (1)), and limited liability company organized under the laws of any state or country. "Syndicate" also includes a general partnership if any partner is

a non-family farm syndicate or non-family farm corporation.

[¶ 16] Section 8(1) of the Nebraska Constitution is very similar to Section 21 of Article XVII of the South Dakota Constitution. There are some differences. The Nebraska language speaks of the prohibition covering the acquisition of or otherwise obtaining an interest "in any title" to real estate used for farming or ranching. South Dakota makes no reference to "any title" and no reference to "ranching." These differences, however, are legally immaterial.

[¶ 17] Nebraska, while also defining a syndicate, exempts from the definition of a syndicate a limited partnership in which the partners "are members of a family". This is a rather broad exemption. South Dakota has no such exemption. All limited partnerships are banned, so to speak, in South Dakota unless exempted in Section 22 wherein there is an exemption but only if a limited partnership is first formed and a majority of the interests therein are held by members of a family (as defined as well in Section 22(1) of Article XVII) or a trust created for the benefit of a member of a family. In other words, a trust itself (standing alone, if you will, for the purpose of farming or owning agricultural land) is not exempt in South Dakota (unless exempted in Section 22) but may under certain circumstances be a member of a qualifying family farm corporation or a qualifying family farm syndicate.

[¶ 18] In Section 8(1) (the "companion" to South Dakota's Section 21), Nebraska exempts a "trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred . . . or their

spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch, and none of whom are nonresident aliens. This shall not include general partnerships." Thus, Nebraska permits general partnerships to own or otherwise acquire an interest in agricultural land and to engage in farming, the reason being that Nebraska does not include a general partnership in the definition of "syndicate." South Dakota also does not include some general partnerships in the definition of "syndicate" but only if no partner in the general partnership is a non-family farm syndicate or non-family farm corporation. South Dakota in Section 21 speaks of a "business trust" whereas Nebraska in Section 8(1) speaks of a "trust."

[¶ 19] Turning to the second prohibition in Article 21, namely "engage in farming", "farming" means the cultivation of land for the production of crops, fruit or other horticultural products. It also includes the ownership, keeping or feeding of animals for the production of livestock or livestock products. Again, this language is all very broad. The Nebraska language is equally broad. A question may arise whether a non-qualifying entity may own land enrolled in the federal conservation reserve program, subject perhaps to the ultimate requirement of divestiture if farming activities later commence on the real estate. We must remember that the Amendment E prohibition is as to "any real estate used for farming." We must also remember that Amendment E defines "farming" as the "cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products." This question, however, will not be answered in this opinion since there is no need to do so.

[¶ 20] Both states then specify certain exemptions. The South Dakota exemptions are found in Section 22. "Exemptions are based upon considerations of public policy. Constitutional and statutory provisions are to be given a reasonable, natural and practical construction to effectuate the purpose for which an exemption is created." *C.A. Wagner Const. Co. v. City of Sioux Falls,* 71 S.D. 587, 27 N.W.2d 916, 920 (1947) (quoting from *State ex rel. Eveland v. Erickson,* 44 S.D. 63, 182 N.W. 315). This same language was later quoted in *McFarland v. Keenan,* 77 S.D. 39, 84 N.W.2d 884 (S.D.1957).

[¶ 21] The first exemption (Section 22(1)) is a "family farm corporation or syndicate." This describes an entity engaged in farming "or the ownership of agricultural land" in which a majority of the partnership interests, shares of stock or other ownership interests are held by "members of a family or a trust (and this would seem at this point of reading Section 22 to mean 'any trust') created for the benefit of a member of that family." The language does not state "members of the same family." It states "members of a family" and all persons are obviously members of "a family." A reasonable reading of the language, however, is that "family" is used in the singular and members of different families would not qualify in deciding whether members of "a family" own a majority interest. The language "trust created for the benefit of a member of *that family*" (emphasis supplied) also indicates that the correct interpretation is that members must be members of the same family under Amendment E.

[¶ 22] Family farm corporations and syndicates are not exempted as to acquiring any interests other than "ownership" unless that entity is also engaged in farming. Family farm corporations, family farm limited

partnerships, and family farm limited liability companies, just like all other corporations, are covered by Section 21 and none are exempted in Section 22(1) as to acquiring easements or as to acquiring any interest (other than outright ownership), whether legal, beneficial, or otherwise in any agricultural real estate unless that entity is also engaged in farming. A "family" is defined as consisting of people related to one another within the fourth degree of kinship according to civil law "or" their spouses. At least one of those family members doing business in a family farm corporation or syndicate must reside on the farm or "be actively engaged in the day-to-day labor and management of the farm." As to both day-to-day labor and management functions, the family member must perform "both daily or routine (and there is obviously some ambiguity here since activity may well be routine without being on a daily basis) substantial physical exertion and administration." As to such corporation or syndicate, no stockholder or member may be a non-resident alien. The term "non-resident alien" is not defined in Amendment E and may mean an alien who is a non-resident of South Dakota although a resident of some other state. It may also mean an alien who is a non-resident of the United States. By statute, an alien who is not a resident of South Dakota or some other state or territory of the United States may not own agricultural land of more than 160 acres, except such land as was received by devise or inheritance. *See* SDCL 43-2A-2. Any such alien who may acquire such lands by devise or descent has three years from acquiring title to dispose of the land. *See* SDCL 43-2A-3. Taking into account Section 14, Article VI. of the South Dakota Constitution ("No distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property") as well as decisions of

the United States Supreme Court, the term "nonresident alien" as contained in Amendment E means an alien who is a non-resident of the United States.

[¶ 23] No member or stockholder (of the family farm corporation or syndicate) may be another corporation or syndicate unless all the persons who own interests in that other corporation or other syndicate are all persons related within the fourth degree of kinship (there being no reference in this sentence to spouses) to the majority of the persons who own interests in the family farm corporation or syndicate itself.

[¶ 24] The Nebraska first exemption is quite similar although it speaks of a family farm or ranch corporation; there is no reference to a ranch in the South Dakota provision. This is, however, legally immaterial since, as stated above, a ranch is covered by the definition of the term "farming" which relates back to the definition of real estate used for farming. The Nebraska first exemption deals only with family farm or ranch corporations and does not address syndicates. Nebraska provides that no corporation or partnership may be a stockholder in the farm or ranch corporation unless all the stockholders or partners of such entities are "persons related within the fourth degree of kindred to the majority of stockholders in the family farm corporation." The Nebraska language is all one sentence. South Dakota has broken the language down to, in effect, five sentences in Section 22(1).

[¶ 25] No mention is made in Section 21 of any cooperative being subject to the prohibitions. That is true in the Nebraska provision as well. A cooperative is not a corporation. No one, at least in South Dakota, calls a cooperative a corporation. No one calls a cooperative a

syndicate. Even a comparison of Section 21 (where the reference is to a corporation) with Section 22(2) makes it clear that if a cooperative was indeed a corporation intended to be exempted by Section 22(2), the word "corporation" would have been used in the exemption. It is not. The word "corporation" is never mentioned in the exemption.

[¶ 26] The South Dakota legislature has never presumed that a cooperative is the same thing as a corporation. See, *e.g.*, SDCL 10-47B-3 (32) in which the definition of a "person" is said to include, *inter alia*, "a corporation" and "a cooperative." Cooperatives in South Dakota are governed by SDCL Chapters 47-15 through 47-18 and by SDCL Chapter 47-20. Foreign cooperatives are governed by SDCL Chapter 47-19 and 47-20. Rural electric cooperatives are governed by SDCL 47-21. A cooperative receives very different treatment under federal laws than does a corporation. Cooperatives are, in general, pursuant to 26 U.S.C. § 501, exempt from federal income taxes, unlike the corporations sought to be reached by Amendment E. The corporations sought to be reached by Amendment E are, of course, not Subchapter "S" corporations. The very idea of a cooperative is an organization of members (not stockholders) entitled in some cases to distributions of earnings based upon patronage. In a corporation, a stockholder is not rewarded based upon the amount of business the stockholder does with the corporation. In fact, a corporation doing any substantial amount of business has no idea what business a stockholder may have conducted with the corporation. Obviously, the very broad prohibitions in Section 21 are not to be lightly or casually extended to cooperatives or to any other unmentioned entity. Nor is this court allowed to add entities or language to Section 21.

[¶ 27] Amendment E sprang from South Dakota's experiences with the statutory corporate farming restrictions found in SDCL Chapter 47-9A. SDCL 47-9A-2 (2) defines "corporation" or "any derivation of 'corporation'" as including "both corporations under the South Dakota Business Corporation Act and limited liability companies under the South Dakota Limited Liability Company Act." Governor William Janklow asked Attorney General Barnett for an official opinion as to whether the prohibitions in the corporate farming act apply to cooperatives. In Opinion No. 95-02 (not cited by any party in this case to the court), the Attorney General expressed his opinion to Governor Janklow that, even though a cooperative is defined at SDCL 47-15-1(2) as a "cooperative corporation", a cooperative is exempt from the Family Farm Act. This court agrees with that opinion of the South Dakota Attorney General.

[¶ 28] There are further clear reasons under South Dakota law why the word "corporation" does not include a "cooperative." "Whenever the meaning of a word or phrase is defined in any statute such definition is applicable to the same word or phrase wherever it occurs except where a contrary intention plainly appears." SDCL 2-14-4. SDCL 47-15-1(2) defines "[C]orporation as a corporation which is not a cooperative." Section 21 of Article XVII also makes no mention of a "foreign cooperative" although we have a statutory definition of "foreign cooperative" at SDCL 47-15-2(4). SDCL 47-15-14 permits any "corporation" to "convert itself into a cooperative. . . ." Likewise, any "cooperative" may "convert itself into a business corporation . . ." by virtue of SDCL 47-2-4.1. Obviously, if one entity may become something else by taking certain legal steps, such an entity is not "something else" until it has

"jumped through the legal hoops." Finally, using any measure of common sense, any person on the street knows that a cooperative is not a corporation. If the people of South Dakota intended to include cooperatives and especially foreign cooperatives in the very broad prohibitions of Amendment E, they could have easily said so. They did not.

[¶ 29] The second exemption in South Dakota (Section 22(2)) deals with certain cooperatives. This is a very curious exemption since, as already explained, cooperatives are not described or listed at all in the general prohibitions contained in Section 21. In other words, there is nothing to exempt. An example comes to mind. The first section of a particular law states, *inter alia,* that "no person" shall engage in certain activities. The next section of the law exempts "domestic animals." Obviously, such an exemption would be meaningless. Since a cooperative is not a corporation, is not a syndicate, and is not covered by Section 21, the exemption is meaningless. There is not even a passing reference in Section 21 to cooperatives. The purported exemption as to cooperatives found in Section 22(2) extends only to agricultural land acquired or leased. Acquired means to own something. Lease means to lease something. The exemption does not state something to the effect of "agricultural land in which an interest has been acquired." The exemption language does not at all track the very broad and extensive language of Section 21, namely to "acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming. . . ." The exemption is much more narrow and, if it has any purpose at all, does not exempt the acquiring of easements, options, or other possible interests in real property by cooperatives. In other words, if the

exemption means anything, no cooperative may acquire any easement, any option in real estate, or any other possible interest in real estate in South Dakota. The exemption covers only ownership or leasing. Section 21 clearly distinguishes an acquisition (i.e. ownership) from acquiring some other non-ownership interest. If this exemption was held to be effective, it would only apply to cooperatives in which a majority of the shares or other interests are held by members of that cooperative which members are "natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock." The idea, based on the evidence at trial, which apparently drove this particular exemption (in the minds of one or more of the sponsors only) was to exclude from farming and from ownership of agricultural land in South Dakota the so-called regional or national cooperatives, i.e. cooperatives owned by local cooperatives, the regional cooperatives being such as Farmland Industries, Harvest States-Cenex, Land 'O Lakes, Inc., and perhaps others. Such cooperatives are not owned by farmers as such. The question arises, however: how can such entities be excluded from the cooperative exemption when no cooperative, whether "local" or "regional" was covered in the first place by Section 21? This purported exemption is particularly troubling since one cannon of statutory construction is that "legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. Commodity Futures Trading Com'n,* 519 U.S. 465, 472, 117 S.Ct. 913, 917, 137 L.Ed.2d 93 (1997). This cannon "is not

an immutable physical law of the universe, but is simply a guide to statutory construction." *State Dept. of Assessments and Taxation v. Maryland Nat. Bank,* 310 Md. 664, 672, 531 A.2d 294, 298 (1987). There is as well an ancient maxim, *Surplusagium non nocet,* i.e. surplusage does not harm. "***If possible,*** effect should be given to every part and every word (emphasis supplied)." *State ex rel. Oster v. Jorgenson,* 136 N.W.2d 870, 875 (S.D.1965). It is not "possible" to give Section 22(2) any effect without first adding the word "cooperative" to Section 21 or finding that a "cooperative" is a "corporation", there being no definition of "corporation" in Amendment E. As stated above, I decline to take either of such radical steps. The provisions of Section 22(2) are mere surplusage. In the alternative, the section is in conflict with the clear and unambiguous language of Section 21. To repeat: a "cooperative" is not a "corporation", at least in South Dakota, and there is therefore nothing to exempt in Section 22(2).

[¶ 30] The Nebraska Constitution has no such "cooperative exemption." That, of course, is not surprising since, as already discussed, the Nebraska general prohibition (dealing with corporations) does not mention cooperatives and no cooperative of any kind is circumscribed by the constitutional provision in Nebraska.

[¶ 31] South Dakota next exempts "[n]onprofit corporations organized under state nonprofit corporation law." Does state mean South Dakota? One would assume so. Is the word "law" to be interpreted as plural, thus covering nonprofit corporations from all states? There is no need to determine any of this since no nonprofit corporation is a party. The Nebraska exemption simply states that the provisions do not apply to "[n]onprofit corporations."

[¶ 32] The next exemption in South Dakota (Section 22(4)) is commonly referred to as a "grandfather clause." It is broadly written, much like Section 21. It allows non-family farm corporations and syndicates to do with agricultural land (other than raise livestock as will hereinafter appear) what they were doing on November 3, 1998, the date Amendment E became law. The broad exemption is for agricultural land which "is being farmed, or which is owned or leased, or in which there is a legal or beneficial interest, directly or indirectly owned, acquired, or obtained by a corporation or syndicate, if such land or other interest is held in continuous ownership or under continuous lease by the same such corporation or syndicate." Thus, while the stockholders or the partners may change, the exemption continues. The exemption as to leased property is not perpetual since no lease of agricultural land for more than twenty years is valid in South Dakota. *See* SDCL 43-32-2. Language dealing with a contract for deed is included in the exemption although a contract for deed is obviously included in the phrase contained in the first sentence of this particular exemption, namely "a legal or beneficial interest." The language dealing with a contract for deed is mere surplusage.

[¶ 33] Nebraska's "grandfather clause" is very similar although it, unlike South Dakota, allows for continuing ownership to meet the requirements of pollution control regulations. Nebraska also includes the surplus language as to a contract for deed.

[¶ 34] The next exemption in South Dakota (Section 22(5)) is the livestock exemption. A non-family farm corporation or syndicate is permitted (1) to continue to own the livestock owned as of November 3, 1998, and (2) to continue to keep or feed livestock under contract as of

November 3, 1998, until the contract expires or is terminated. Once any such contract expires or is terminated, the non-family farm corporation or syndicate may no longer acquire or keep and feed livestock. Unless a non-family farm corporation or syndicate had previously entered into a contract with some entity for the keeping and care of livestock, such entity is prohibited from acquiring or dealing with any new or replacement livestock after November 3, 1998. In other words, such entity could not replace the livestock as the livestock die, are sold or slaughtered. Thus, any such nonqualifying entity, even though it is permitted (by the terms of Amendment E) to continue to own pasture land owned as of November 3, 1998, could not acquire new or replacement livestock to be able to utilize the pasture land. Nor could the non-qualifying entity directly use any of its barns, sheds or shelters for livestock. Nebraska has no such provision. A further very significant problem for non-qualifying owners of pasture land is Article XVII, Section 7, of the South Dakota Constitution: "No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or *hold any real estate except such as may be necessary and proper for its legitimate business*" (emphasis supplied). Thus, not only may the non-qualifying entity not use its pasture land to raise livestock, the entity may not even continue to own the pasture land since it may not engage in farming.

[¶ 35] The next exemption in South Dakota (Section 22(6)) is for a farm operated for research or experimental purposes but only if any commercial sales from the farm are "only incidental to the research or experimental objectives of the corporation or syndicate." The Nebraska provision is basically the same.

[¶ 36] Land leases by alfalfa processors for the production of alfalfa are exempted from Section 21 (Section 22(7)). Thus, any lease by a non-qualifying entity for the purpose of obtaining alfalfa to feed livestock is prohibited by Amendment E. The Nebraska provision is virtually identical.

[¶ 37] There is an exemption for agricultural land operated for the purpose of growing seed, nursery plants, or sod (Section 22(8)). The Nebraska provision is identical.

[¶ 38] Mineral rights on agricultural land (Section 22(9)), as in Nebraska, are exempted.

[¶ 39] The next exemption (Section 22(10)) is for agricultural land "acquired or leased by a corporation or syndicate for immediate or potential nonfarming (sic) purposes, for a period of five years from the date of purchase." It is clear that no non-qualifying entity having development in mind could own or lease the agricultural land for more than five years. When the five years has expired and the land is still agricultural land, the non-family corporation or syndicate would be in violation of Amendment E and would be required to dispose of the land or terminate the lease. During the five year period, the non-qualifying entity could not use the land for farming except by leasing it (either as the owner of the land or by virtue of a sub-lease of some kind) to a qualified family farm, whether that family farm is incorporated or not. This particular exemption is very narrow. It does track or match, for some unknown reasons, the broad prohibitions expressed in Section 21. In other words, the prohibition in Section 21 is much broader than the exemption in Section 22(11). The agricultural land must have been acquired, i.e. purchased and then owned, or leased from another entity.

The exemption does not authorize easements, options to buy, or any other interest, whether legal, beneficial or otherwise. This means that utility companies such as the three electric utility companies who are parties plaintiff in this case, pipeline companies, municipal corporations wanting to install water lines or sewer lines under agricultural property, railroads, wind power companies, and similar entities could not acquire easements; they would be required to purchase or lease the corridor as well as the sites for towers, windmills and other structures. However, even with a purchase or lease of the corridor, such an entity could not hold such ownership or leasehold interest for more than five years unless, at the end of the five year period and thereafter, the land was not used for any agricultural purpose.

[¶ 40] The language from the Nebraska Constitution is much the same as Section 22(10), although it refers also to "nonranching (sic) purposes."

[¶ 41] The next exemption (Section 22(11)) allows agricultural land and livestock to be acquired by a corporation or syndicate to enforce a lien or foreclose a security interest or mortgage. Again, the word acquired in this context clearly means to take ownership. The corporation or syndicate has five years to then dispose of the real estate and six months to dispose of the livestock. During the period that the real estate is held it may not be used for farming except under a lease to a family farm corporation, family farm syndicate, nonsyndicate (sic), or noncorporate (sic) farm. The exemption here does not deal with filing or obtaining any statutory lien but only with the enforcement of a lien and thus acquiring the land. It is clear that the exemption is not as broad as the language in Section 21, i.e. "acquire, or otherwise obtain an interest,

whether legal, beneficial, or otherwise." What any possible rationale there might be for this is unknown to the court. This exemption as written in Section 22(11) would permit the holder of a mechanic's lien or other statutory lien in effect on November 3, 1998, to foreclose the lien. Because Section 22(11) authorizes the acquisition (i.e.ownership) of agricultural land or livestock does not mean that the filing or recording of a lien is permitted. The exemption, however, must be read in conjunction with Section 22(13) which permits a "bona fide encumbrance taken for purposes of security", language also taken verbatim from the Nebraska provision.

[¶ 42] The Nebraska provision comparable to Section 22(10) is largely identical although no maximum holding period is specified for livestock so acquired.

[¶ 43] The next exemption (Section 22(12)) allows state or nationally chartered banks (without specifying that the bank in question must have legally authorized trust powers and without taking into account that many banks in South Dakota do not have legally authorized trust powers) to act as trustees for persons, corporations or syndicates but only if such persons, corporations or syndicates are already exempt from Amendment E. This constitutional provision overrides certain provisions of the banking and trust company statutory scheme under South Dakota law. This trust exemption as to entities (individual farmers, family farm corporations and family farm syndicates) already not covered by Section 21 tells us that, in the absence of the exemption, no agricultural land (and the exemption does not cover livestock) could ever be placed in or continued in trust by any person or entity engaged in farming or owning agricultural land. Otherwise, there would be no purpose for the exemption. At first

blush, a "business trust" (a named prohibited entity in Section 21) probably did not include a so-called living trust or a testamentary trust since "business trust" was rather narrowly defined in SDCL 47-14-1 when Amendment E was adopted. Since then, the definition has been substantially broadened by the South Dakota Legislature. *See* 47-14A-1. Thus, the ownership interests in a non-family farm syndicate or stock in a non-family farm corporation may not be placed in or continued in trust, either a so-called living trust or a testamentary trust, regardless of who is acting as trustee. The reason, of course, is that, if any such trust is a "business trust" it is a syndicate pursuant to Section 21 and is prohibited from engaging in farming or owning any interests in agricultural real estate. It is also clear that no farmer or rancher (regardless of the manner in which the farmer or rancher is doing business) may place or retain agricultural land in trust with an individual trustee such as a surviving spouse or child. Livestock may not be placed or retained in trust in any type of trust, regardless of the type of trustee. Some existing trusts in the course of estate planning in South Dakota have been established as irrevocable trusts. One or more of the individual plaintiffs already have agricultural property, real and personal, in trust.

[¶ 44] Trusts are commonly used to avoid probate, to save federal estate tax, and to allow the surviving spouse to receive all the income from the farm business enterprise with the farm business enterprise ultimately passing to a child or the children of the farm couple. Trusts holding agricultural real property and engaging in farming have been widely used for many years in South Dakota. Many farmers who established such a trust were already deceased when Amendment E came into being and probate

courts had already ordered the establishment of the trusts and the transfers of property to the trusts from the decedents' estates. In many cases, the surviving spouse is already acting as trustee. Others have drawn wills with pour-over provisions into such a trust. Others still alive have agricultural property already in trust. Having practiced law for 30 years and advised many farmer clients as to estate planning before taking office, I take judicial notice of these facts. As to all these trusts already established or in the process of probate (if a testamentary trust rather than a living trust was used) divestiture would be required by the provisions of Section 24, if Amendment E is constitutional.

[¶ 45] There are further trust considerations. Section 21 tells us that the term corporation "means any corporation organized under the laws of any state of the United States or any country." Section 21 does not tell us what syndicate "means." It tells us that the term "includes" certain entities. It does not tell us that trusts, other than "business trusts" are included or excluded. It tells us that "syndicate" does not include general partnerships "except general partnerships in which nonfamily (sic) farm syndicates or nonfamily (sic) farm corporations are members." Again, it does not tell us that certain trusts are "not included" in the definition of a syndicate.

[¶ 46] Nebraska has no such separate trust exemption provision, apparently because family trusts are specifically exempted by Section 8(1) of the Nebraska Constitution.

[¶ 47] As already noted, there is an exemption (Section 22(13)) for a "bona fide encumbrance taken for purposes of security." The quoted language was apparently copied from SDCL 47-9A-6 which language has not been

interpreted by South Dakota courts. As already noted, Nebraska has an identical provision. This language, on a reasonable reading, authorizes the filing of a lien to acquire a mechanic's lien and the acquisition of other statutory liens permitted by South Dakota laws. A more careful drafter would have simply exempted acts permitted by South Dakota law in connection with acquiring a mechanic's lien or any other lien granted by South Dakota statutes. For example, we have a trucker's lien for transporting livestock (SDCL 44-11-9), ambulance liens against agricultural real estate of the patient (SDCL 44-13-1) and the patient's spouse (SDCL 44-13-3), crop liens (SDCL 38-17-1 to 38-17-19), possessory liens for trespassing livestock (SDCL Chapter 40-28), veterinarians' vaccination liens (SDCL 40-27-12, *et seq.*), liens in connection with the sale of livestock (SDCL 44-6-5), the vendor's lien (SDCL 44-6-1) and the vendee's lien (SDCL 44-6-2) against agricultural land, and perhaps other liens. The language used in the exemption could have been written in a more encompassing manner but will be read reasonably to permit an otherwise prohibited entity from acquiring these and other similar statutory liens.

[¶ 48] There is an exemption (Section 22(14)) for custom spraying, fertilizing, or harvesting. Nebraska has identical exemptions. It was the court's first thought that this language would obviate any concerns about a lien being acquired by operation of law as to these three activities, the thought being that Section 22(13) or, for that matter, Section 22(11), would not be sufficiently broad to cover such liens. It initially seemed odd to the court to refer to "custom spraying" and "fertilizing" other than the fact that the Nebraska exemption was copied. There are no South Dakota statutory liens for such activities. The

concerns of the court initially related to a common rule of statutory construction, namely that once you start down a "laundry list" confusion may be created. Section 22(14) is a very short "laundry list." Under the maxim of construction known as *expressio unius est exclusio alterius;* the express mention in a statute of one thing implies the exclusion of other similar things. Black's Law Dictionary 581 (6th Ed.1990). The court is now convinced, however, that the language in this exemption does not relate to statutory liens. Instead, it is designed to make it clear that custom spraying, fertilizing, or harvesting of crops do not constitute "farming." The exemption matches, to some extent, SDCL 47-9A-2 (2) of the family farm act, where we are told that farming does not include "a contract whereby a processor or distributor of farm products or supplies provides spraying, harvesting or other farm services."

[¶ 49] In Section 22(15), Amendment E exempts livestock futures contracts, livestock purchased for slaughter within two weeks of the purchase date, "or" livestock purchased and resold within two weeks. Nebraska exempts livestock futures contracts, livestock purchased for slaughter (which is an exemption much broader than that of South Dakota), "or" livestock purchased and resold within two weeks.

[¶ 50] Nebraska exempts "Nebraska Indian tribal corporations." South Dakota has no such exemption. There are no provisions for Indian tribal corporations, as such, under South Dakota law. Tribes incorporate entities under general South Dakota law, either as a business corporation or as a non-profit corporation. Clearly, the State of South Dakota has no authority to regulate what the various tribes do in Indian Country in the use or ownership of agricultural land.

[¶ 51] Nebraska exempts agricultural land operated by a corporation for the purpose of raising poultry. South Dakota has no such exemption.

[¶ 52] As provided by Section 23, a family farm corporation or family farm syndicate that is qualified and later ceases to meet the requirements of Amendment E must be dissolved. However, if a majority of the stock in the non-qualifying corporation or the majority interests in the non-qualifying syndicate are held by persons related to one another within the fourth degree of kinship or their spouses, the non-qualifying entity may retain the land for twenty years but may not increase the land holdings. The Nebraska provision is virtually identical except the holding period is fifty years rather than twenty.

[¶ 53] By virtue of Section 24, all corporations and syndicates owning agricultural land or engaging in farming are required to file an annual report. This includes all such corporations and syndicates, whether family farms or not. The Attorney General is mandated to bring lawsuits to "enjoin any pending illegal purchase of land or livestock." This is a daunting task indeed to expect the Attorney General to know of all pending illegal purchases or acquisitions. The Attorney General is also mandated to bring lawsuits to force divestiture of land or livestock held in violation of Amendment E. State court judges are directed to order any land held in violation of Sections 21 through 24 to be divested in two years. If the court's order to divest in two years is not accomplished, the court is directed to order that the land is to escheat to the state. One must assume that these provisions do not override the grace period extended by Section 23 as to non-qualifying entities (which were at one time qualified) to divest in

twenty years. The state court judge is to order divestiture of livestock within six months.

[¶ 54] Nebraska has a similar provision although the Nebraska Attorney General must have "reason to believe" that a violation is occurring before taking action.

[¶ 55] Admittedly, the court could be criticized for discussing Amendment E language not directly impacting one or more of the present plaintiffs. I fully recognize that decisions should not be written in the manner of law review articles or advisory opinions. I have, however, already provided to the parties my thoughts on what Amendment E says; they are fully aware of that and at that point I had not made a decision as to what portions of the language would become important in the court's decision. There is a further and more important reason: the court, as will hereinafter appear, is required to perform a balancing test, comparing putative local benefits of Amendment E with the burdens imposed on interstate commerce.

DECISION

I. Cooperatives

[¶ 56] Plaintiff Donald Tesch ("Tesch") owns a 1000 head hog confinement facility in South Dakota. He finishes hogs under a contract with Harvest States Cooperative, a regional cooperative. Harvest States provides Tesch with hogs weighing 40-65 pounds and he feeds them out to 240-265 pounds. Harvest States owns the hogs that Tesch feeds in his barns. If Tesch is required to own the animals that he feeds, he will require $350,000.00 to $450,000.00 each 18 week cycle to purchase the hogs. He has requested

such financing from many banks; no bank has been willing to lend him money to buy his own hogs.

[¶ 57] Tesch's ten year contract with Harvest States expires in 2006. Because of Amendment E, Tesch has been notified by Harvest States that the contract cannot be renewed. Tesch comes before the court alleging that Amendment E may prohibit him from doing business (as he is now doing) with Harvest States.

[¶ 58] Mr. Tesch and Farm Bureau members are entitled to an answer as to cooperatives, regardless of whether Amendment E violates the United States Constitution, and I will provide that answer.

[¶ 59] Based on my previous discussion of whether or not cooperatives are included in Amendment E, it is clear that Tesch may continue to do business with a cooperative, local or regional, and that Amendment E does not prohibit what he has been doing and apparently intends to continue to do. Given this interpretation of the law, there is nothing to enjoin as to Tesch or South Dakota Farm Bureau on behalf of its members who are in similar circumstances as Tesch.

II. ADA

[¶ 60] The Eighth Circuit has held that private individuals can in fact sue state officials under the ADA for prospective, injunctive relief only. *Grey v. Wilburn,* 270 F.3d 607, 609 (8th Cir. 2001). The Eighth Circuit held in *Gibson v. Arkansas Department of Correction,* 265 F.3d 718, 720 (8th Cir. 2001) (quoting *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)):

> The Eleventh Amendment is not a bar to "federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'"

The foregoing principle is equally applicable to non-employment claims based on Title II of the ADA. *Klingler v. Director, Dept. of Revenue,* 281 F.3d 776, 776 (8th Cir. 2002), and *Randolph v. Rodgers,* 253 F.3d 342, 347-48 (8th Cir. 2001).

[¶ 61] My prior order (which was not, of course, a final order) dismissing plaintiffs' ADA claim, which was issued prior to *Gibson* and *Grey,* is in error and should be rescinded.

[¶ 62] The allegations as to claims under the ADA in the original complaint are somewhat confusing and contradictory. It could be argued that only Farm Bureau has advanced such claims. "[F]or an association to have Article III standing to bring suit on behalf of its members, 'the interests at stake must be germane to the organization's purpose.'" *Central South Dakota Co-op. Grazing Dist. v. Secretary of U.S. Dept. of Agriculture,* 266 F.3d 889, 897 (8th Cir. 2001) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Services,* 528 U.S. 167, 181, 120 S.Ct. 693, 704, 145 L.Ed.2d 610 (2000)). There is no evidence in the record to support associational standing as to the ADA claims by Farm Bureau, perhaps because of the erroneous previous ruling made by the court. Farm Bureau, however, like the Farmers' Union, broadly represents farmer members' interests before legislative and other bodies on a routine basis. The court takes judicial notice of this. Representing the claims of presently "disabled farmers" who are members of Farm Bureau and farmer members

yet to become disabled may be something of a "stretch" but the court will allow the associational standing. It makes no difference, in any event, since ADA claims of plaintiffs Frank Brost ("Brost") and Marston Holben ("Holben") were submitted at trial as offers of proof which offers of proof are now accepted by the court. The court also construes the ADA allegations in the original complaint as including Brost's and Holben's claims.

[¶ 63] Brost owns a ranch in Western South Dakota, lives about two hours drive away from his ranch and, at the time of trial, had not been to the ranch for six weeks. Brost is 65 years old and is physically unable to do the physical activities required to maintain the ranch or any other strenuous physical labor. He has had serious heart problems, underwent surgery shortly before the trial, and was unable to even travel from his home near Rapid City to the place of trial. Brost does the planning, marketing, and financing. He is the final decision-maker for the ranch. Physical labor required to run the ranch is performed by his ranch foreman, David Newbold ("Newbold").

[¶ 64] Brost's ranch is owned by four separate entities. The first entity is Brost Land and Cattle Company, a South Dakota corporation incorporated in 1979. Brost is the sole shareholder. This corporation owns 3,100 acres of agricultural land, all of the equipment involved in the cattle operation, and most of the cattle.

[¶ 65] The second entity is the Frank Brost Limited Partnership which owns land that Brost inherited from his parents. He is the general partner while his three sons each have a 1.5% ownership share. As part of his estate planning, Brost planned to gift each year a portion of this limited partnership to his three children. One of Brost's

sons works for General Mills and lives in Minneapolis. Another son lives in Sioux Falls and works for Gateway. A third son teaches and lives in Rapid City. None of the sons take any part in the management or physical operation of the ranch.

[¶ 66] The third entity is the Brost/Newbold Limited Liability Partnership, formed in 1998 as a "retirement plan bonus" for Brost's ranch foreman, David Newbold. Brost owns 88% of the partnership interests, Brost Cattle Company owns 1%, and Newbold owns 11%. Brost gifts $10,000.00 worth of units in the partnership to Newbold each year as an incentive to keep Newbold employed. This limited liability entity owns 2,080 acres of ranch land.

[¶ 67] Brost also owns land and cattle personally. There are no buildings of any kind on the land owned by the Brost Limited Partnership or on the land owned by the Brost/Newbold Limited Liability Partnership. There is no residence on the land owned by Brost Land and Cattle Company.

[¶ 68] The cattle owned personally and by the corporation are fed to 600-800 pounds and then sold primarily to livestock feeder operations to be finished. The cattle must be owned for more than two weeks (thus not qualifying for any possible exemption from Amendment E) in order to feed them out to 600-800 pounds.

[¶ 69] Brost transferred ownership of his ranch land, livestock, and equipment to limited liability entities in order to obtain financing. The banks that he does business with would not loan him money unless ownership of the ranch was held in a limited liability format. If Brost is forced to divest himself, he will pay significant capital gains taxes of at least $400,000.00. Financially, Brost

would be unable to continue owning the ranch if he cannot own it in a limited liability format.

[¶ 70] Mr. Holben lives in Phoenix, Arizona. He and his wife created a living trust in which they are the trustors, trustees, and beneficiaries. The trust owns all stock in Spear H Ranch, LLC. Spear H Ranch consists of 2,600 acres of grassland in Butte County, South Dakota. Holben's South Dakota residence is between 45 and 50 miles from the ranch. He spends up to eight months a year in Arizona and the remaining time in South Dakota. There is no residence, no running water, and no electricity on the land owned by Spear H Ranch.

[¶ 71] The Holben LLC owns steers which feed on the grassland. These steers are owned for more than two weeks at a time. They are bought in the Spring and sold in the Fall.

[¶ 72] Holben does not and cannot do day-to-day labor on the ranch. He is absent from the ranch for at least two to three weeks at a time. He is absent when he is living in Arizona. Due to 1989 heart bypass surgery, Holben is unable to do any strenuous work on the ranch or anywhere else. He contracts out fence repair and hires cowboys to do all the physical cowboy work, such as checking cattle, rounding up cattle who stray, and tending to the animals' medical needs. The only physical work (if it can even be called that) Holben is able to do consists of riding into the pasture on a horse or all-terrain vehicle to count the cattle and check for pink eye. Clearly, these limited activities do not meet the requirements of any Amendment E exemption.

[¶ 73] Title II of the ADA provides, in part, that "no qualified individual with a disability shall, by reason of

such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. That provision does not limit the ADA's coverage to conduct that occurs in the "programs, services, or activities" of the State but is instead a "catch-all phrase that prohibits all discrimination by a public entity, regardless of the context." *Innovative Health Systems, Inc. v. City of White Plains,* 117 F.3d 37, 45 (2nd Cir. 1997), overruled on other grounds by *Zervos v. Verizon New York,* 252 F.3d 163, 171 n. 7 (2nd Cir. 2001).

[¶ 74] "Title II applies to anything a public entity does. Title II coverage, however, is not limited to 'Executive' agencies, but includes activities of the legislative and judicial branches of State and local governments." 28 CFR Part 35, Appendix A – Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services (Published July 26, 1991). At least two circuits have held that Title II of the ADA applies to zoning decisions made by a city. *See Innovative Health Systems, Inc. v. City of White Plains, supra,* and *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch,* 179 F.3d 725, 730 (9th Cir. 1999). Zoning ordinances are analogous to Amendment E. Zoning ordinances limit how property may be used and, indirectly, who may use the property. Amendment E limits the use of South Dakota agricultural land (prohibiting its use for farming) by disabled individuals (those who cannot do substantial physical exertion on a daily basis) who own the land in a limited liability format.

[¶ 75] South Dakota may legislatively place certain restrictions on how property is used. The State may

legislatively place certain restrictions on who may use property. The State may not, however, base those restrictions on impermissible categories such as religion, race, gender, and, under the ADA, disability.

[¶ 76] A corporation, of course, cannot have a disability. "It is well established that a shareholder or officer of a corporation cannot recover for legal injuries suffered by the corporation." *Audio Odyssey, Ltd. v. Brenton First Nat. Bank,* 245 F.3d 721, 729 (8th Cir. 2001). "The rule applies even to a corporation's sole shareholder." *Id.* However, the foregoing " 'shareholder standing rule' does not apply when the alleged injury is distinct from that suffered by the corporation or other shareholders." *Id.* "A 'distinct' injury is one in which the claimant's rights have been violated, not merely one in which the claimant is indirectly harmed because of one party's injury to another." *Id.* Amendment E does more than place limits on limited liability entities; it prohibits disabled persons who cannot live "on the farm" from owning South Dakota agricultural land in a limited liability format and using such land for farming. Non-disabled persons are not so limited.

> The Supreme Court has made it clear that the ADA "addresses substantial limitations on major life activities, not utter inabilities." *Bragdon v. Abbott,* 524 U.S. 624, 641, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). A person is substantially limited in working if he or she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Because disability is determined on a case-by-case basis, "[a] court must ask whether the particular impairment constitutes

> for the particular person a significant barrier to employment." *Webb v. Garelick Mfg. Co.,* 94 F.3d 484, 488 (8th Cir. 1996) (internal quotation omitted).

Moysis v. DTG Datanet, 278 F.3d 819, 825 (8th Cir. 2002). As in *Moysis,* "[t]his is not a case, then, in which plaintiff's condition causes difficulty with a single aspect of a single job position." *Moysis v. DTG Datanet,* 278 F.3d at 825 (quoting *Maziarka v. Mills Fleet Farm, Inc.,* 245 F.3d 675, 680 (8th Cir. 2001)). Brost and Holben are physically unable to perform all of the physical labor required to raise livestock on their South Dakota ranch land. Performing substantial physical exertion is a prerequisite under Amendment E to engaging in farming as a member of a limited liability entity. Some member of the entity must be a non-disabled individual or a person who lives "on the farm." The only member of the Brost Land and Cattle Co. Inc. is a disabled individual. A non-disabled farmer need not live on the farm. A disabled farmer would be required to live on the farm to be able to conduct business in a limited liability format. People who are disabled obviously tend to prefer to live in or very near larger communities with health care facilities able to promptly and easily meet their medical needs. There is no such facility in or even near Lyman County, South Dakota, the location of the Brost ranch. Brost would be hours away from medical care he needs.

[¶ 77] Amendment E harms Brost and Holben individually in their abilities to own and use agricultural land in a limited liability format. They have shown a distinct injury from that of the entities in which they own an interest.

[¶ 78] Brost's and Holben's farming activities do not qualify under the "grandfather clause" because, as discussed previously, they purchase cattle in the spring, which cattle would not be "grandfathered." The effect of Amendment E, as discussed above, is to prevent those individuals who cannot live on the farm or perform "both daily or routine substantial physical exertion and administration" from owning in a limited liability format South Dakota agricultural land for the feeding of livestock if such livestock are purchased in the spring and sold in the fall. Those individuals not only could not engage in the occupation of raising cattle; they would have to dissolve their limited liability entities or sell their grass land. Plaintiffs have shown that Amendment E constitutes an attempt to override the ADA.

[¶ 79] Any state law and state constitutional provision which conflicts with federal law is preempted under the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI, cl. 2. Congressional intent to preempt state law can either be expressed in statutory language or implied in the structure and purpose of the federal law in question. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

[¶ 80] State law is "pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, *or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress*" *South Dakota Min. Ass'n, Inc. v. Lawrence County,* 155 F.3d 1005, 1009 (8th Cir. 1998) (*citing California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987)) (emphasis in original). Amendment E directly collides with the ADA. It is impossible for the

defendants to enforce and comply with Amendment E without violating the ADA. As has been stated: "We first note that we know of no authority for the proposition that a law that is facially invalid under the Commerce Clause may nonetheless be upheld 'as enforced.'" *Ben Oehrleins & Sons & Daughter v. Hennepin County,* 115 F.3d 1372, 1383 (8th Cir. 1997). The same principle should be applied to Amendment E, the provisions of which cannot be severed to delete the offending language as to the ADA.

[¶ 81] "Where a state statute conflicts with, or frustrates, federal law, the former must give way." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 663, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993). Article XVII, sections 21-24 of the South Dakota Constitution are, in part, contrary to the Supremacy Clause of the United States Constitution. Amendment E is therefore void. As previously discussed, since unconstitutional provisions of the South Dakota Constitution cannot, as a matter of law, be severed, the entirety of Amendment E must fall.

III. Commerce Clause

[¶ 82] Montana-Dakota Utilities Company, Northwestern Public Service Company and Otter Tail Power Company are collectively known as the Big Stone Partners. Together they own and operate the very large Big Stone Power Plant in South Dakota (Big Stone I). The percentage of ownership of the plant changed in the mid 1980's, reflecting changing power usages by the individual partners.

[¶ 83] Land owned in conjunction with the power plant includes farm land not directly being used for power production activities. This land is leased to local farmers

and generates income of approximately $15,000.00 – $20,000.00 annually. The land is clearly necessary to present and future operations of the power plant.

[¶ 84] If the partners again wish to change the percentage of ownership interests to reflect a changing trend in usages, they would no longer qualify under the grandfather provisions. Amendment E would require the newly configured partners to divest that portion of the land owned by the partners which is unimproved agriculture land. Divestiture would result in loss of income to the partners. Amendment E effectively precludes the partners from ever changing the percentage of ownership of the power plant site.

[¶ 85] The partners are in the process of preparing to build a second power plant (Big Stone II). Big Stone II will be physically located on land already owned by the partners. The cooling pond will be located on land yet to be acquired. Big Stone II will not be owned by the current Big Stone Partners. Land now owned by the Big Stone Partners will have to be conveyed to the new owners of Big Stone II. Amendment E prohibits any limited liability entity, including the Big Stone Partners, from owning, leasing, acquiring an easement, or acquiring an option to purchase real estate "used for farming" in South Dakota, unless such ownership pre-existed Amendment E and is allowed under the grandfather clause. The ownership interests associated with Big Stone II would not fall under the grandfather clause. It takes between five and ten years to develop and build a power plant. Thus, the owners of Big Stone II would not be able to purchase and own the land for the construction of the plant unless they can convert the land into the plant facility within five years. If

they exceed that deadline, Amendment E would require divestiture.

[¶ 86] Big Stone II will require the acquisition of new transmission power line corridors over South Dakota agricultural land and such corridors will extend into other states. The exemption in Section 22(10) of Amendment E for agricultural land "acquired or leased by a corporation or syndicate for immediate or potential nonfarming (sic) purposes" does not exempt from Amendment E and therefore permit easements, options to buy, or any other interest, whether legal, beneficial or otherwise. Again, the exemption for some unknown illogical reason was not drawn to "track" the broad prohibitions contained in Section 21. This means that utility companies such as the three electric utility companies who are parties plaintiff in this case could not acquire easements; they would be required to purchase or lease the corridor as well as the sites for any structures such as high-line towers. The purchase of land within the corridor for a transmission line tower is two to three times more expensive than the purchase of a mere easement. Even with the purchase or lease of the corridor, the utility companies could not retain such ownership or leasehold interest for more than five years unless, at the end of the five year period and thereafter, the land was not used for any agricultural purpose. The corridors thus could not be farmed by the local farmers. The agricultural land would necessarily lay fallow. Utility companies would incur the expense of hiring someone to keep the weeds at bay, in perpetuity. Where those corridors run through pasture land, fences would have to be erected by the utilities to prevent grazing, an activity which is clearly included in the definition of farming.

[¶ 87] Because of the Amendment E restrictions on use of corridors, it is unlikely that those who own and farm South Dakota agricultural land would voluntarily sell transmission line corridors to the utilities or to others seeking corridors, such as pipeline companies, wind power companies, railroads, and other entities. The farm family would have to sell (or lease for a limited number of years, not to exceed 20) the 120 foot wide corridor through the farm property, thus dividing the farm property. With the corridor being fenced, the farmer would, in the absence of gates, be prohibited from passing through the corridor to gain access to the remaining portion of the farm. If the farm family did agree to sell or lease such a corridor, they would be creating two separate fields or pastures, requiring two separate ingress roads and, in the case of pasture land, perhaps two separate sources of water. It is unlikely that farmers would agree to this without exacting an exorbitant fee, if at all. Condemnation would likely be required in virtually every case, substantially increasing the cost of doing business in an industry where a profit is guaranteed by virtue of rates charged consumers. Without question, state regulatory bodies will permit if not require that these costs of doing business be passed on to utility customers. Thus, higher rates would be spread among all customers of the utility companies, regardless of where the customers live, inside or outside South Dakota.

[¶ 88] Otter Tail Power Company, which has its principal place of business in Fergus Falls, Minnesota, has interstate transmission lines between South Dakota and other states and serves customers in both South Dakota and Minnesota. Likewise, Montana-Dakota Utilities Company serves customers inside and outside South Dakota.

[¶ 89] The Commerce Clause (Art. I, § 8, cl.3) of the United States Constitution authorizes Congress "to regulate commerce . . . among the several States." Thus, Congress has been granted the power to so regulate, necessarily restricting the power of any state to regulate interstate commerce. Plaintiffs contend that the limited liability organization farming ban in Amendment E violates the dormant Commerce Clause. The U.S. Supreme Court has recognized a dormant Commerce Clause which limits an individual state from adopting "regulations that discriminate against interstate commerce." *West Lynn Creamery, Inc., v. Healy,* 512 U.S. 186, 192, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994). As I explained in *American Meat Institute, et al. v. Barnett,* 64 F.Supp.2d 906, 917 (D.S.D.1999):

> The Dormant Commerce Clause "prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *West Lynn Creamery, Inc., v. Healy,* 512 U.S. 186, 192, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994), quoting *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 273-274, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988).
>
> In judging Constitutional challenges to state statutes under the Dormant Commerce Clause, the U.S. Supreme Court has developed a two-tier approach. *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573, 578-579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). The first tier is simple enough. If the challenged state statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the U.S. Supreme Court has

"generally struck down the statute without further inquiry." *Id.* at 579, 106 S.Ct. 2080, 90 L.Ed.2d 552. The United States Court of Appeals for the Eighth Circuit, in explaining this tier, teaches that "a state regulation is per se invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state." *Cotto Waxo Company v. Williams,* 46 F.3d 790, 793 (8th Cir. 1995).

A state statute that directly regulates or discriminates against interstate commerce is subject to strict scrutiny. *Maine v. Taylor,* 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). To withstand the Constitutional challenge, the state must show "that the statute serves a legitimate local purpose unrelated to economic protectionism and that the purpose could not be served as well by nondiscriminatory means." *Cotto Waxo,* 46 F.3d 790 at 793, *citing Hughes v. Oklahoma,* 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). Therefore, if the . . . statute is found to directly regulate or discriminate against interstate commerce, strict scrutiny applies and the statute can only be upheld upon a significant showing by the state that it is not striving for economic isolation.

The second tier approach is utilized when a state statute only indirectly affects interstate commerce and regulates evenhandedly. *Brown-Forman Distillers Corporation v. New York State Liquor Authority,* 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). The inquiry is whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Id., citing Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct.

844, 25 L.Ed.2d 174 (1970). This balancing test weighs the burdens of the statute on interstate commerce with the putative local benefits. *Cotto Waxo,* 46 F.3d at 793. If the burden on interstate commerce is slight and the public benefit is great, then the statute can be upheld.

The Court must first determine if the . . . statute directly regulates or discriminates against interstate commerce. If so, then tier I is applied and the statute is per se unconstitutional and it can be saved only by a tremendous showing by the state of its local benefit and the absence of any other means to achieve that benefit. If the statute indirectly affects interstate commerce, then tier II applies. The Court must then balance the burdens on interstate commerce with the local benefits. If the benefits are greater, then the statute does not violate the Dormant Commerce Clause . . . . In addition, the United States Court of Appeals for the Eighth Circuit teaches that the Dormant Commerce Clause invalidates state statutes which require people or businesses to conduct their out-of-state commerce in a certain way. *Cotto Waxo,* 46 F.3d at 793 (*citing Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, and *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552, for that proposition). If a state statute requires out-of-state commerce to be conducted according to in-state terms, then the statute burdens interstate commerce. *Cotto Waxo,* 46 F.3d at 793 . . .

Brown-Forman teaches us or reaffirms a number of legal principles already discussed. As we analyze state economic regulation under the Dormant Commerce Clause, the critical consideration for the court is the overall effect of the state law on both

> local and interstate activity. Any state statute that directly regulates interstate commerce is to be struck down without further inquiry. However, a statute having only indirect effects on interstate commerce and which regulates evenhandedly is to be examined in the context of whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. There is no clear line which separates the category of state regulation that is virtually per se invalid under the Dormant Commerce Clause and the category subject to the *Pike v. Bruce Church* balancing approach . . . Negatively affecting interstate commerce is not the same as discriminating against interstate commerce.

[¶ 90] Plaintiffs contend that Amendment E fails the "first tier" of the *Brown-Forman* test, the "discrimination" tier. " 'Discrimination' for purposes of the Commerce Clause" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County,* 115 F.3d 1372, 1383 (8th Cir. 1997) (quoting *Oregon Waste Sys. Inc. v. Department of Envtl. Quality,* 511 U.S. 93, 99, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994)). "A state law may discriminate against interstate commerce on its face, in its purpose, or in its effect. *SDDS, Inc.,* 47 F.3d at 267." *Ben Oehrleins,* 115 F.3d at 1383.

[¶ 91] Plaintiffs contend that Amendment E is facially discriminatory and thus unconstitutional under the dormant Commerce Clause based upon a reading of the exceptions set forth in Sections 22(1) through 22(15) which exceptions, plaintiffs claim, "have the consequence of

securing to South Dakota farmers many of the benefits of a limited liability format while denying farmers or farm investors in neighboring States such benefits." Certainly, a reading of exceptions to a statute may demonstrate a "pattern of parochialism apparent in [the] statute" which would demonstrate a purpose to discriminate against interstate Commerce. *Kassel v. Consolidated Freightways Corp. of Delaware,* 450 U.S. 662, 676 n. 22, 101 S.Ct. 1309, 1319 n. 22, 67 L.Ed.2d 580 (1981).

[¶ 92] Amendment E grants farmers who are South Dakota residents and live on the farm (or who have a family member who lives on the farm) leeway in controlling decisions about their limited liability formats; this leeway is denied to a non-resident disabled farmer who, for example, lives just across the state line but wishes to own and manage farm land in South Dakota in a limited liability format. This is in the nature of mere surplusage since the court has already found clear violation of the ADA. A farmer living in a distant state who owns South Dakota farm land would be unable to comply with the exceptions for those who live on the farm or perform daily substantial physical labor. Such farmer would be able personally to do neither in a limited liability format. By the same token, a person engaged in agriculture who lives in Aberdeen, for example, and wishes to manage farm land in Lyman County also could personally not do business in a limited liability format. Thus, there is no inherent discrimination in the context of the dormant Commerce Clause against non-resident non-disabled farm land owners. In that sense, Amendment E is not subject to strict scrutiny since it serves a legitimate local purpose unrelated to economic protectionism.

[¶ 93] "Extraterritorial reach invalidates a state statute when the statute requires people or businesses to conduct their out-of-state commerce in a certain way." *Cotto Waxo Co. v. Williams,* 46 F.3d at 793. "[A] statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms." *Id.* at 794. Amendment E does not require out-of-state limited liability entities to conduct their commerce according to South Dakota's terms. While Amendment E may affect their participation in interstate commerce, Amendment E itself is indifferent to commerce occurring out-of-state. Foreign limited liability entities are able to conduct their out-of-state commerce regardless of their relationship to South Dakota. *Id.* I conclude that Amendment E does not suffer from an unconstitutional extraterritorial reach as to out-of-state farmers or out-of-state limited liability entities.

[¶ 94] Plaintiffs claim also that Amendment E is targeted at the livestock industry and it is therefore inherently an attempt to regulate interstate commerce, which regulation, *Brown-Forman* teaches us, is a violation of the dormant Commerce Clause. There was some evidence at trial that Amendment E was motivated by discriminatory purposes. Discriminatory purpose can be established by direct evidence, such as the language of the measure itself or the rhetoric of the legislative history of the measure. Since the initiated measure was adopted, the "pro" statement in the state sponsored ballot pamphlet is the most important. *SDDS, Inc. v. State of South Dakota,* 47 F.3d 263, 270 (8th Cir. 1995). The legislative history of Amendment E includes a pamphlet widely circulated by the Secretary of State which sets forth a pro-amendment and an anti-amendment position. Part of that pamphlet

argues that voters should protect South Dakota from out-of-state interests. This is clearly some evidence of discriminatory purpose. The expressed purpose, however, is more broad, namely to retain family farms and to prevent limited liability entities, regardless of their home base, from gaining control of the food supply. I decline to find sufficient discriminatory purpose.

[¶ 95] Plaintiffs also contend that Amendment E is discriminatory in its *effect*. "Negatively affecting interstate commerce is not the same as discriminating against interstate commerce. In a Commerce Clause context, 'discrimination' means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Cotto Waxo Co. v. Williams,* 46 F.3d at 794. Plaintiffs contend that Amendment E "has the effect of excluding corporate investors from raising or finishing livestock in South Dakota since such investors cannot satisfy the narrow family farm exception of Section 22(1)." While Amendment E prevents out-of-state limited liability entities from raising livestock in South Dakota, it does not prevent them from raising livestock elsewhere. In that sense, Amendment E does not affect how these entities conduct business outside South Dakota. Evidence was presented that Amendment E has prevented millions of dollars of commercial development, to the permanent detriment of the economy in South Dakota. While the cost of doing business in South Dakota may have risen for all concerned, namely both in-state and out-of-state limited liability entities, and while that may suppress future development in South Dakota, that does not translate into unconstitutional discrimination and the contentions of the plaintiffs in this regard are rejected.

[¶ 96] Plaintiffs suggest that the State's claimed interests as to Amendment E cannot be considered "compelling." In 1982, Nebraska voters adopted an amendment to the Nebraska Constitution, the objective being to prohibit non-family farm corporations from owning and operating Nebraska farm and ranch land. The United States Court of Appeals for the Eighth Circuit, in the context of an equal protection challenge, held that Nebraska's purpose in enacting this somewhat similar corporate farming ban (although clearly considerably narrower than Amendment E) "represents a legitimate state interest under the equal protection clause (citing cases)." *MSM Farms, Inc. v. Spire,* 927 F.2d 330, 333 (8th Cir. 1991). The conclusion was: "The people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land. It is not for the courts to second-guess the wisdom of this judgment. The equal protection clause is satisfied if the law adopted through the initiative process is rationally related to a legitimate state interest. The district court properly applied this test . . . and its judgment upholding the law is hereby affirmed." *Id.* at 335. The case from Nebraska did not involve challenges under the dormant Commerce Clause. The evidence presented in court, the court's knowledge of the economic hardships endured by family farmers in competing with large "other players" in agriculture, and the evidence of fears of spoilation [sic] of the environment by entities in which the owners are sheltered from personal responsibility all show not only a legitimate state interest but a compelling state interest.

[¶ 97] Plaintiffs contend, nonetheless, that this Court should reject the rational basis test applied in *MSM Farms* and instead apply a "rational basis with bite" standard. Plaintiffs cite *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), in support of this claimed new heightened scrutiny standard. *Romer* did apply the traditional rational basis test but concluded that the Colorado amendment "lacks a rational relationship to legitimate state interests," *Id.* at 632, 116 S.Ct. at 1627, because a "desire to harm a politically unpopular group [homosexuals] cannot constitute a legitimate governmental interest." *Id.* at 634, 116 S.Ct. at 1628.

[¶ 98] Plaintiffs argue that *Romer* stands for the proposition that where a statute identifies persons by a single trait, in this case a limited liability business format, heightened scrutiny must be applied – a "breadth" test. Plaintiffs claim that the limited liability ban on farming is over-broad in that it will prohibit real family farmers, such as the individual plaintiffs, from continuing in their business. While this might be true (as to continuing in business) in the absence of the court striking down Amendment E, it is of no legal consequence. *Romer* does not stand for the proposition advanced by plaintiffs.

[¶ 99] In *MSM Farms,* no argument was advanced that the measure involved "any suspect classifications." Disabled persons have not yet been held by the courts to constitute a "suspect classification." A permanently disabled person, however, like persons of a particular gender, race, or national origin cannot change his or her status. Suffice it to say that this court is suspicious of classifications based on being permanently disabled as distinguished from robust health and fitness.

[¶ 100] In 1932, North Dakota voters adopted an initiated measure which required corporations, both domestic and foreign, to dispose of agricultural land within ten years. The United States Supreme Court held that the "fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it." *Asbury Hospital v. Cass County, N.D.,* 326 U.S. 207, 211, 66 S.Ct. 61, 63, 90 L.Ed. 6 (1945). Even legislation excluding a corporation from continuing in the state, which legislation is subsequent to the corporation's acquisition of property, can be sustained. *Id.* at 211-12, 66 S.Ct. at 63-64. *Asbury Hospital* further held that the North Dakota statute's exclusion for farm corporations did not deny equal protection. *Id.* at 213, 66 S.Ct. at 65. "Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it." *Asbury Hospital,* 326 U.S. at 215, 66 S.Ct. at 65. No issue was raised or decided as to the dormant Commerce Clause.

[¶ 101] Amendment E, like similar limited liability entity farming bans in North Dakota and Nebraska, appears to be designed to prohibit large corporations, which already largely control the ultimate processing and distribution of agricultural commodities, from vertically integrating an industry to the competitive exclusion of the traditional family farmer. "It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community,

and such statute is rationally related to a legitimate state interest." *State ex rel Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 806 (Mo.1988) (citing *Asbury Hospital* and *Omaha National Bank v. Spire*).

[¶ 102] None of the foregoing, however, is the end of the inquiry. Regulating or more correctly over-regulating interstate utility corridors and very likely excluding new investments in electric and wind power generation and transmission facilities intended for interstate use could constitute direct regulation of interstate commerce by South Dakota rather than by the Congress. A state measure that directly regulates interstate commerce is subject to strict scrutiny and the State would then be required to show that the measure serves a legitimate local purpose unrelated to economic protectionism and that the purpose could not be served as well by nondiscriminatory means. Amendment E stems from a degree of economic protectionism which can well be accomplished by exempting utilities from any such regulation. All of this has to do with the "first tier."

[¶ 103] The court, however, need not cross the "first tier bridge" and chooses to rely on the so-called "second tier" approach, the *Pike v. Bruce Church, Inc.* balancing test. The inquiry is then whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the putative local benefits. This proceeds on the assumption that the measure only indirectly affects interstate commerce and regulates even-handedly. In a sense, it does since South Dakota based utilities operating only intrastate are as much "hamstrung" by Amendment E as non-South Dakota based utilities. As to utilities, interstate pipeline companies, wind power generators with needed interstate transmission lines,

interstate railroads, and interstate communication companies, Amendment E clearly places a substantial burden on interstate commerce. It will greatly increase the costs of the described companies doing business in South Dakota as well as in other states where the companies do business. Any new corridors acquired for transmission lines or pipelines or any other industrial purpose cannot be farmed (as has historically been done, usually by the fee owner farmer without cost to the utility) and these companies will thus incur substantial annual additional costs to comply with other laws and to keep weeds under control. Utility rates in South Dakota and elsewhere, including certainly Minnesota, will undoubtedly increase. South Dakota is a prime location for the generation of wind power. Other states need that power.

[¶ 104] This case is akin to *Kassel v. Consolidated Freightways,* 450 U.S. 662, 669, 101 S.Ct. 1309, 1315, 67 L.Ed.2d 580 (1981), where the United States Supreme Court struck down an Iowa law setting truck length limitations which prohibited 65 foot "doubles" from using Iowa highways. If Iowa was allowed to prohibit them, it would affect interstate commerce going from Illinois to Nebraska on Interstate 80. The Supreme Court held that the law substantially burdened interstate commerce because diverting semis around Iowa engendered inefficiency and added expense. *Id.* at 674, 101 S.Ct. at 1318. "[A] State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it." *Id.* at 678, 101 S.Ct. at 1320.

[¶ 105] Similarly, if South Dakota is allowed to prohibit easements for transmission lines, whether for electricity, wind power, water, or natural gas, running through South Dakota to connect two states on either side of South

Dakota, causing greatly increased costs to utilities and other companies, interstate commerce would be greatly affected.

[¶ 106] There is no legitimate state interest of any kind in burdening utilities or rate payers or, for that matter, owners of agricultural land, with any of this "utility business." Claims were made that no such effects were even intended. It is undisputed that there is no rationality to the matter of prohibiting these easements. It is, of course, impossible to know what the voters intended. We are, however, left with what the measure says, not what voters or others now wish it might say.

[¶ 107] Performing the required "balancing test" Amendment E violates the dormant Commerce Clause of the United States Constitution. The burdens imposed on interstate commerce are clearly excessive in relation to the putative local benefits. This is true whether the utility provisions are balanced against the putative benefits of Amendment E *in toto* or *vis a vis* the lack of an exemption for utility enterprises.

[¶ 108] Plaintiffs have sought a permanent injunction to prohibit the defendants from enforcing or attempting to enforce Amendment E. This would be an idle act, no enforcement of Amendment E having been attempted at this stage other than the passage of certain rules. State officials and certainly the defendants will follow the terms of any court order and this court should not lightly enjoin state elected officials. Thus, the request for an injunction should be denied.

[¶ 109] The foregoing constitutes the court's findings of fact and conclusions of law.

ORDER

[¶ 110] Based upon the foregoing,

[¶ 111] IT IS ORDERED:

1. Plaintiffs' request for a declaratory judgment herein is granted.

2. Article XVII, Sections 21 -24, of the South Dakota Constitution are unconstitutional and unenforceable.

3. Plaintiffs' motion for injunctive relief is denied.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 02-2366/2588/2644/2646

South Dakota Farm Bureau, Inc., et al.,	*	
Appellees,	*	
vs.	*	Order Denying Petition
Joyce Hazeltine, et al.,	*	for Rehearing and for Rehearing En Banc
Appellants,	*	
Dakota Rural Action; South Dakota Resources Coalition,	*	
Intervenors.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Wollman took no part in the consideration or decision of this matter.

(5128-010199)

October 31, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

SOUTH DAKOTA CONSTITUTION ARTICLE XVII

§ 21. Corporate or syndicate farming prohibited – Definitions Restrictions.

No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming. The term, corporation, means any corporation organized under the laws of any state of the United States or any country. The term, syndicate, includes any limited partnership, limited liability partnership, business trust, or limited liability company organized under the laws of any state of the United States or any country. A syndicate does not include general partnerships, except general partnerships in which nonfamily farm syndicates or nonfamily farm corporations are partners. The term, farming, means the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products.

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§ 22. Restrictions – Application.

The restrictions in § 21 of Article XVII do not apply to:

(1) A family farm corporation or syndicate. A family farm corporation or syndicate is a corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family. The term, family, means natural persons related to one another within the fourth degree of kinship according to civil law, or their spouses. At least one of the family members

in a family farm corporation or syndicate shall reside on or be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration. None of the corporation's or syndicate's partners, members, or stockholders may be nonresident aliens, or other corporations or syndicates, unless all of the stockholders, members, or partners of such entities are persons related within the fourth degree of kinship to the majority of partners, members, or stockholders in the family farm corporation or syndicate;

(2) Agricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock;

(3) Nonprofit corporations organized under state nonprofit corporation law;

(4) Agricultural land, which, as of the approval date of this amendment, is being farmed, or which is owned or leased, or in which there is a legal or beneficial interest, directly or indirectly owned, acquired, or obtained by a corporation or syndicate, if such land or other interest is held in continuous ownership or under continuous lease by the same such corporation or syndicate. For the purposes of this exemption, land purchased on a contract signed as of

the approval date of this amendment is considered as owned on that date;

(5) Livestock, which as of the approval date of this amendment, is owned by a corporation or syndicate. For the purposes of this exemption, livestock to be produced under contract for a corporation or syndicate are considered as owned, if the contract is for the keeping or feeding of livestock and is signed as of the approval date of this amendment, and if the contract remains in effect and is not terminated by either party to the contract. This exemption does not extend beyond the term of any contract signed as of the approval date of this amendment;

(6) A farm operated for research or experimental purposes, if any commercial sales from the farm are only incidental to the research or experimental objectives of the corporation or syndicate;

(7) Land leases by alfalfa processors for the production of alfalfa;

(8) Agricultural land operated for the purpose of growing seed, nursery plants, or sod;

(9) Mineral rights on agricultural land;

(10) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential nonfarming purposes, for a period of five years from the date of purchase. A corporation or syndicate may hold such agricultural land in such acreage as may be necessary to its nonfarm business operation, but pending the development of the agricultural land for nonfarm purposes, such land may not be used for farming except under lease to a family farm corporation or family farm syndicate or a non syndicate or noncorporate farm;

(11) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and may not be used for farming before being disposed of, except under a lease to a family farm corporation or syndicate, or a nonsyndicate or noncorporate farm. Any livestock so acquired shall be disposed of within six months;

(12) Agricultural lands held by a state or nationally chartered bank as trustee for a person, corporation or syndicate that is otherwise exempt from the provisions of §§ 21 to 24, inclusive, of Article XVII;

(13) A bona fide encumbrance taken for purposes of security;

(14) Custom spraying, fertilizing, or harvesting;

(15) Livestock futures contracts, livestock purchased for slaughter within two weeks of the purchase date, or livestock purchased and resold within two weeks.

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§ 23. Loss of qualification – Requalification or dissolution.

If a family farm corporation or family farm syndicate that has qualified under all the requirements of a family farm corporation or a family farm syndicate ceases to meet the defined criteria, it has twenty years, if the ownership of the majority of the stock of such corporation, or the majority of the ownership interest of such syndicate, continues to be held by persons related to one another within the fourth degree of kinship or their spouses, and

their land holdings are not increased, to either requalify as a family farm corporation or family farm syndicate or dissolve and return to personal ownership.

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§ 24. Annual report – Violations – Action and enforcement.

Any corporation or syndicate that owns agricultural land or engages in farming is required to report information necessary for the enforcement of §§ 21 to 24, inclusive, of Article XVII to the secretary of state on an annual basis, under rules promulgated by the secretary pursuant to state law. The secretary of state shall monitor such reports and notify the attorney general of any possible violations, and any resident of the state may also notify the attorney general of any possible violations. If a corporation or syndicate violates any provision of §§ 21 to 24, inclusive, of Article XVII, the attorney general shall commence an action in circuit court to enjoin any pending illegal purchase of land or livestock, or to force divestiture of land or livestock held in violation of §§ 21 to 24, inclusive, of Article XVII. The court shall order any land held in violation of §§ 21 to 24, inclusive, of Article XVII to be divested within two years and any livestock to be divested within six months. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the state. If the attorney general fails to bring an action in circuit court to enforce §§ 21 to 24, inclusive, of Article XVII, any resident of the state has standing in circuit court to sue for enforcement.

**Defendant's
Exhibit
302**

**1998 Ballot Question Pamphlet
Compiled by the
Office of Secretary of State Joyce Hazeltine**

Title: Initiated amendment to Article XVII of the South Dakota Constitution concerning ownership and interest in farming.

Attorney General Explanation

Currently, the Constitution does not restrict the use or ownership of farmland. However, the Legislature has prohibited some corporations from engaging in farming, and in certain hog production activities.

Amendment E would create constitutional prohibitions. Many corporations, limited partnerships, limited liability companies, and other business entities would not be permitted to own farmland or engage in farming or livestock production.

Amendment E does not affect current ownership or leasing of farmland, or livestock production, by these businesses. However, it would prohibit them from farming new land, or buying, leasing, or contracting for any new interest in farm lands, farming or livestock production. The Amendment may potentially prevent these businesses from renewing current leases.

Amendment E would not affect qualified family farm corporations, nonprofit corporations certain ag co-ops, research farms, alfalfa leases, livestock futures, certain

custom farm work, security interests, the purchase of land for nonfarm purposes, and other activities.

A vote "Yes" will prohibit many types of businesses from owning farmlands. It will also prevent these businesses from having interests in agricultural contracts, farmlands, or operations.

A vote "No" will leave the Constitution as it is.

Pro – Constitutional Amendment E

Family agriculture is the economic foundation for South Dakota communities – rural and urban. Income earned by family farmers and ranchers is spent on local mainstreets and is multiplied again and again as it moves through the local and regional economies.

However large non-family farm corporations increasingly threaten our traditional rural way of life. Constitutional Amendment E gives South Dakota voters the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations.

Constitutional Amendment E is a logical extension of South Dakota's 1974 Family Farm Act and the 1988 amendment prohibiting non-family farm, corporate ownership of pork production facilities. The amendment is almost identical to popular and successful constitutional provisions approved by voters in our neighboring state of Nebraska more than 15 years ago. The only real difference is an exemption contained in Amendment E for farmer-owned cooperatives.

Constitutional Amendment E expands and strengthens our anti-corporate farming statutes with an additional prohibition of non-family farm, corporate ownership of livestock. Supporters say Amendment E is needed to prevent corporations from using interlocking boards and other anti-competitive ties with the meatpacking industry from limiting and then ending market access for independent livestock producers.

These corporations – now making their play to control South Dakota livestock production – have something else. They have track records of significant and repeated environmental violations – a far distance from the solid record of land stewardship practiced by family farmers and ranchers.

Handing control of South Dakota agriculture over to non-family farm and ranch corporations will not build value-added agriculture. Desperately needed profits will be skimmed out of local economies and into the pockets of distant corporations.

Passage of Constitutional Amendment E will reaffirm South Dakota's commitment to family agriculture. More importantly it will prevent large, non-family farm corporations from using unfair, anti-competitive advantages to turn independent family farmers and ranchers into a new generation of sharecroppers.

Submitted by: Charlie Johnson, RR 2 Box 29, Madison, SD 57642 and Dennis Wiese, 707 S. Crescent, Flandreau, SD 57028 who are co-chairmen of Vote Yes for Amendment E. Mr. Johnson represents Dakota Rural Action and Mr. Wiese is president of South Dakota Farmers Union.

Con – Constitutional Amendment E

Amendment E is unfair to South Dakota farmers and ranchers. It is a poorly thought out idea that does not belong in our constitution.

Specifically, Amendment E would put into our State's constitution language that:

1. Discriminates against successful family farmers;

   The language of Amendment E does not clearly distinguish between South Dakota farmers and out-of-state-based farmers and ranchers.

2. Eliminates financial options needed to save the family farm;

   Amendment E bans many business structures currently used by South Dakota farmers and ranchers to remain financially solvent and thereby able to stay in business.

3. Cripples value-added agriculture development;

   South Dakota agriculture needs more capital investment not less. By banning non-related farmers from working together to further the agriculture industry, Amendment E would cripple our economic future.

4. Fails to help the environment;

   There is absolutely no language in Amendment E that addresses the environment. None! It was left out.

5. Does nothing to address concerns regarding large scale hog farms;

> The word hog was also left out of the language of the petition. Therefore, the severe restrictions that Amendment E is suppose [sic] to place on large out-of-state hog confinement facilities would be placed on ALL our farmers and ranchers whether they raise corn, soybeans, cattle or sheep.

Finally, the issues that the proponents of Amendment E claim to be concerned about should be debated in the Legislature. Our constitution should not be violated with complicated and confusing language advocated by a small band of special interests.

You can help South Dakota agriculture and yourself by stopping this devastating proposal.

Please join the thousands of South Dakotans who have already studied the issue and determined that the right thing to do is Vote No on Amendment E.

Submitted by: Frank Brost, 404 W. Missouri Ave., Pierre, SD 57501 and Tom Batcheller, 1437 S. Westward Ho Place, Sioux Falls, SD 57105. Mr. Brost is a Jones County rancher and co-chair of Vote No on E committee. Mr. Batcheller is a Sioux Falls agri-businessman and treasurer of Vote No on E committee.

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(3) (4)

Nos. 03-1111 and 03-1108

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHRIS NELSON,
SOUTH DAKOTA SECRETARY OF STATE, *et al.*,
Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,
Respondents.

-and-

DAKOTA RURAL ACTION,
SOUTH DAKOTA RESOURCES COALITION,
Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Should this Court grant certiorari to petitioners to review the unanimous Court of Appeals decision that South Dakota's ban on so-called "corporate farming" impermissibly discriminated against interstate commerce in violation of this Court's dormant Commerce Clause doctrine?

CORPORATE DISCLOSURE STATEMENT

Montana-Dakota Utilities Co. is a division of MDU Resources, Inc. Northwestern Public Service is a division of Northwestern Corporation. On 9 April 2002, Otter Tail Power Company changed its corporate name to Otter Tail Corporation. No publicly traded company owns 10% or more of the stock of any of these entities. The other corporate entities for Respondents are privately held corporations.

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Petitioners request that this Court grant certiorari to review an unremarkable decision of the Court of Appeals for the Eighth Circuit. *See* State Petitioners' Appendix at 1-27 (hereinafter referenced as "St. App. at __"). That unanimous panel decision held that a South Dakota law that prohibited certain common business practices in the livestock production industry and the electric utility power industries discriminated against interstate commerce in violation of this Court's dormant Commerce Clause doctrine. The petitions should be denied because the questions involved in this case are controlled by the previous decisions of this Court. Moreover, there is no conflict among the lower courts regarding the routine and doctrinally ordinary issues presented herein.

STATEMENT OF CASE

A. South Dakota's Regulation Of Interstate Commerce: "Amendment E".

The state regulatory scheme at issue in this case is a provision of the South Dakota State Constitution, Art. XVII, §§ 21-24. *See* St. App. at 90-94. It was adopted in 1998. Because of its placement on the ballot in 1998, it has been called "Amendment E". (Respondents will use hereinafter this terminology.) Amendment E is a detailed, intricate and comprehensive regulatory scheme that restricts the use of "corporate" or limited liability business structures by business entities involved in farming or ranching. St. App. at 90-94.

B. Factual Background.

1. General History of Amendment E.

As a matter of history, South Dakota's regulation of the involvement of corporations in agriculture began, for present purposes, with the Legislative passage of the Family Farm Act of 1974 (the "Act"). SDCL §§ 47-9A-1, *et seq*. Under the Act, corporate ownership or leasing of "agricultural land" was generally restricted.[1] The Act did not apply, however, to the livestock production industry.

The Act provided, for domestic corporations, two basic exemptions from the general prohibition of corporate format. The first was the "family farm corporation", SDCL § 47-9A-14. The second exemption was the provision for an "authorized farm corporation". *See id.* at 15. For present purposes, the authorized farm corporation might be understood as an exemption for certain small, closely-held corporations, defined largely in terms of federal income tax law.

The Act was tightened in 1988. It was amended to prohibit all corporations except family farm corporations from owning or operating a "hog confinement facility". *See* SDCL § 47-9A-13.1. Subsequent to 1988, it appeared that corporations could own the hogs that were raised or finished by South Dakota farmers. It was in response to this "contract farming" practice that the proponents of

1. The Act explicitly prohibited foreign corporations from any ownership of land. *See* SDCL §§ 47-9A-13 and 14; *Allegheny Corp. v. Richardson, Inc.*, 463 N.W.2d 678, 679 (S. D. 1990). This indicates that State law historically favored domestic corporations and discriminated against out-of-state corporations.

Amendment E (led by Petitioners Dakota Rural Action and South Dakota Resources Coalition) started the Initiative process that culminated in Amendment E.

Although South Dakota appeared to have established a comprehensive regulatory scheme under the Act, the State hardened its position by adopting Amendment E. St. App. at 5. Amendment E is qualitatively more restrictive and more burdensome regarding interstate commerce in the livestock production and electric power industries.

The constitutionally significant differences between the Act and Amendment E are: (1) although the Act only applied to land ownership, Amendment E applied to the ownership of livestock; (2) although both the Act and Amendment E had exceptions for so-called "family farm" operations, the family farm exception under Section 22(1) of Amendment E was much narrower; (3) the Act had a second exception (for "authorized farm corporations") but Amendment E does not have this type of exception; (4) Amendment E was enacted as an amendment to the South Dakota Constitution thereby restricting any opportunities for its opponents, including Respondents, to use the normal legislative processes to correct any mistakes created by Amendment E; and (5) Amendment E's enforcement procedures (*e.g.*, "citizen standing") were much broader and potentially intrusive than the enforcement provisions of the Act, which relied on the Attorney General's office and the Secretary of State's office.

2. The Legislative History of Amendment E.

Both the sequence of events leading to the development of Amendment E and its legislative history are significant to understanding the soundness of the Eighth Circuit's

unanimous decision. *See* St. App. at 18-24. Although the Act prohibited most corporate involvement in agriculture, certain groups (including petitioners Dakota Rural Action ("DRA") and South Dakota Resources Coalition ("SDRC")) sought to impose even more restrictive regulations. Starting in March 1997, these sponsors held a set of meetings called "Hog Meetings". St. App. at 20. These meetings featured politicians and other activists generally strategizing against hog farming facilities (hence—the name "Hog Meetings"). Because of South Dakota's initiative laws, the sponsors had to act quickly in order to qualify any proposed amendment for the November 1998 ballot. In fact, the sponsors completed all deliberation and all drafting in less than eight weeks. As the lower courts recognized, this time pressure lead to haste in drafting, other procedural irregularities, *see* St. App. at 36, and nullified any chance that the proponents actually studied the potential effects of Amendment E. *See* St. App. at 22-23.

During this hasty drafting process, the sponsors were "warned" several times about the dormant Commerce Clause issues created by such a broad regulatory measure as Amendment E. For example, at the very first drafting meeting, the only lawyer on the five-person committee warned that the proposed amendment faced "Commerce Clause" problems; the lawyer was ignored. Trial Ex. 36. Shortly after this initial warning, the drafting committee was warned again—this time by a distinguished agricultural economist who the Eighth Circuit called an "expert"—that Amendment E would be vulnerable because it established such "complete" barriers to capital flow. St. App. at 21. Despite these warnings, the drafters, according to the Eighth Circuit, "charged forward without hesitation". *Id* at 22.

During the Initiative election campaign, several additional events occurred that demonstrated the protectionist purpose of the sponsors of Amendment E. First, the Initiative process provided the sponsors with a chance to promote Amendment E. The sponsors of Amendment E prepared a document called the "Pró Statement" which is disseminated to the voters. As the Eighth Circuit concluded, the Pro Statement was "brimming with protectionist rhetoric". *See* St. App. at 18-19. One example of the protectionist rhetoric was the statement that, unless Amendment E would pass, "[d]esperately needed profits will be skimmed out of the local economies and into the pockets of distant corporations". *Id.* at 19. Moreover, the sponsors further claimed in the Pro Statement that "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations". *Id.* In sum, the sponsors "sold" Amendment to the voters based on economic favoritism for "local economies" and hostility to "distant corporations". *See id.*

Second, in the Official Ballot Statement, South Dakota's Attorney General Mark Barnett (who was originally a defendant here) stated to all voters: "Amendment E could result in successful lawsuits against the State of South Dakota, under the U.S. Constitution". *See Hoogestraat v. Barnett*, 583 N.W.2d 421, 422 (S.D. 1998). On state law grounds, the South Dakota Supreme Court removed the sentence but not before it had state-wide publicity.

In addition to these "official" documents, the Eighth Circuit carefully reviewed other evidence of discriminatory purpose produced by Respondents at trial, mainly from cross-examination of Petitioners' witnesses. *See id.* at 20-22.

One of the most glaring pieces of testimony was the admission by the State's expert witness that Amendment E was a "South Dakota Law designed to restrict operation of global agribusiness firms". Trial Tr. at 505. The Eighth Circuit focused, moreover, on the testimony of one of the drafters of the Pro Statement that the purpose of Amendment E was to avoid "the Murphy hog farm unit [in North Carolina] and what its [sic] done to the environment". *See* St. App. at 20.

Other trial testimony, from drafters and other sponsors, established the transparency of the protectionism underlying Amendment E.[2] As the Eighth Circuit concluded: "It is clear that those individuals had a discriminatory purpose". *Id.* at 23.

3. The Adverse Impact of Amendment E on Interstate Commerce.

The adoption of Amendment E has created many economic problems for Respondents and other farmers and ranchers. At trial, the Respondents demonstrated the constitutionally pernicious consequences of Amendment E. Amendment E, for example, has severely limited the "value-added" process of "custom feeding livestock". Under Amendment E, feedlots cannot finish investor-owned livestock if the investor has a corporate format; Amendment E, therefore, interferes with

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2. Even the District Court had concluded that "There was some evidence at trial that Amendment E was motivated by discriminatory purposes." St. App. at 80. Indeed, when one reads the whole transcript, it is Respondents' contention that the testimony of the sponsors (including the drafters and their lawyer) presents a collective impression that the sponsors were proud of their economic protectionism and even defiant regarding the "warnings" (based on federal constitutional law) which they had received.

the interstate flow of investment capital. Amendment E has restricted all forms of "contract livestock production". From the testimony of State officials, the District Court learned that investment in farming and ranching, especially by non-residents, has been suppressed and distorted, with the burden on interstate commerce running into the millions of dollars.

The Utility Respondents, obviously participants in interstate commerce, demonstrated at trial how Amendment E had adversely impacted interstate commerce in several ways. First, the Utility Respondents are each interstate transmission utilities. Transmission corridors utilized by these transmission companies are typically owned by utilities in the form of transmission easements. The proscriptions of Amendment E apply to ". . . an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state. . . ." St. App. at 90. The District Court made a finding of fact that Amendment E cuts off the Utility Respondents from their traditional easements and increases their costs. *Id.* at 86.

Another significant burden on interstate commerce created by Amendment E relates to the wind power aspect of the Utility Respondents' business. *Id.* at 87. Amendment E blocks the development of transmission corridors for electric power generated by wind farms. South Dakota is a "prime location" for potential output of electrical energy generated by wind power; if South Dakota does not carry its share of wind power, it will place a greater burden on interstate commerce to develop wind power in other states. *Id.* at 86.

In sum, the effects of Amendment E on interstate commerce have been substantial and far-reaching. As the District Court recognized in its findings of fact, Amendment E has placed enormous added costs on Respondents, and others,

doing business in interstate commerce. St. App. at 86. Amendment E has suppressed interstate investment in the livestock industry, especially production contract farming and custom-finishing of livestock. Amendment E has prohibited the flow of interstate investment, particularly in the livestock industry and in the electric power production industry. In an interlocking multitude of ways, Amendment E has suppressed and impermissibly distorted interstate commerce.

C. Procedural History

Shortly after Amendment E was adopted, the Respondents began their investigation of the effects of Amendment E on the livestock and electric power industries and their planning of an appropriate legal action. The Respondents filed their claims in federal district court for the District of South Dakota. The Respondents from the livestock industry were joined by the Utility Respondents from the electric power generation and transmission industries.

Following discovery, the District Court denied various motions for summary judgment brought both by the State Petitioners and by the Intervenor Petitioners. The District Court (the Honorable Charles Kornmann) held a five-day bench trial in December, 2001. Respondents pursued their dormant Commerce Clause theories. The Respondents argued, and presented evidence, that Amendment E was a "discriminatory" state regulatory scheme. Respondents argued that Amendment E was discriminatory, under three theories: discriminatory purpose, facial discrimination and discriminatory effect. Respondents also argued, alternatively, that Amendment E "unduly burdened" interstate commerce.

The District Court eventually ruled for the Respondents on several grounds, including the dormant Commerce Clause claim. St. App. at 87. The District Court relied on the second tier of the dormant Commerce Clause doctrine, holding that Amendment E imposed an undue burden on interstate commerce. *See* St. App. at 85-86.

Both Petitioners appealed to the court of appeals for the Eighth Circuit. On appeal, the Respondents contended, as below, that Amendment E was both a discriminatory state regulatory scheme and, alternatively, one that unduly burdened interstate commerce. *See* St. App. at 26-27. Respondents contended that Amendment E was discriminatory under all three theories. St. App. at 18. Following briefing and oral argument, the Eighth Circuit panel unanimously affirmed the District Court but on different grounds. The Eighth Circuit held that the Amendment E regulatory scheme was discriminatory and that the state Petitioners did not satisfy their burden of persuasion. St. App. at 26-27. The Eighth Circuit carefully indicated that, because it found overwhelming evidence of a discriminatory purpose underlying Amendment E, "we do not consider the other two tests [for discrimination], or the second tier analysis, the *Pike* balancing test." St. App. at 18. The Eighth Circuit concluded that it had found the evidence of discriminatory purpose in the record sufficient to place the case in the discrimination tier of the dormant Commerce Clause doctrine.

The Intervenor Petitioners sought rehearing and rehearing *en banc*. The State Petitioners did not join, but also did not disclaim, the rehearing petition. The rehearing petition was eventually denied. St. App. at 3. Subsequently, both Petitioners timely filed separate petitions for a writ of certiorari with this Court.

REASONS FOR DENYING THE PETITION

This is an unremarkable case. The decision by the Court of Appeals was a straight-forward, almost routine application of this Court's dormant Commerce Clause jurisprudence. The Eighth Circuit's decision does not conflict in any way with this Court's decisions or any other circuit's decisions concerning the dormant commerce Clause doctrine. Moreover, since the South Dakota law at issue is unusual (and certainly the most extreme of any such laws), this case does not represent a constitutional issue of significant public importance.

As discussed below, this case is merely an old-fashioned dormant Commerce Clause case. The Eighth Circuit's ruling was proper in all respects, and Respondents respectfully urge this Honorable Court to deny the Petitions for Writ of Certiorari.

ARGUMENTS

I. This Case Does Not Present An Issue To Which The Lower Courts Are In Conflict.

In an attempt to secure this Court's attention, Petitioners claim that the Eighth Circuit's decision conflicts with this Court's decisions or with certain lower court decisions. Upon examination, however, these claims are simply not sustainable.

A. This Eighth Circuit's Ruling Does Not Conflict With Any Of This Court's Decisions.

The Petitioners place primary reliance on an alleged conflict with this Court's decision in *Exxon Corporation v.*

Governor of Maryland, 437 U.S. 117 (1978). *See* State Pet. at 12; Intervenor Pet. at 11. When the holding in *Exxon Corp.* is properly described, however, it is apparent that the Eighth Circuit decision does not in any way conflict with *Exxon Corp.* decision.

1. The *Exxon Corp.* Decision.

In *Exxon Corp.*, the state of Maryland enacted a statute requiring producers and refiners of petroleum products to divest any retail gasoline stations in Maryland. 437 U.S. at 125. The divestiture statute was challenged under several constitutional theories, including dormant Commerce Clause doctrine. *See id.* at 122. At the time the statute was passed, there were no producers or refiners in Maryland, and the burden of divestiture fell, therefore, solely on out-of-state companies. This Court concluded only a "small" percentage of the retail gasoline stations would be impacted. *Id.* at 123.

Petitioners' argument is flawed because they rely only on certain dictum in *Exxon Corp.* Such reliance is inadequate to support the petitions. The *Exxon Corp.* decision rested on the unique facts that there were no local producers or refiners and, hence, no local entities could have been "favored". *See id.* at 125 Moreover, the *Exxon Corp.* Court concluded that the record in this case showed "no demonstrable effect whatsoever on the interstate flow of goods". *Id.* at 126 n.16. Because there was no burden on interstate commerce and no evidence of protectionism, this Court in *Exxon Corp.* decided that the Maryland statute was not discriminatory. *Id.* at 125.

The Petitioners also argue that the *Exxon Corp.* "principle" has been "reaffirmed". Actually, any principle derived from *Exxon Corp.* has been narrowed over time,

particularly in this Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 40-41 (1980). In *Lewis*, just two years after *Exxon Corp.*, this Court confirmed that the *Exxon Corp.* decision depended on the absence of any showing that interstate commerce was burdened. *Lewis*, 447 U.S. at 42. *See* Laurence H. Tribe, *American Constitutional Law* 1059 n.1 (3d ed. 2000) (*Exxon Corp.* decision depended upon "no evidence" of discrimination).

2. The Eighth Circuit's Ruling Is Distinguishable From *Exxon Corp.*

When the *Exxon Corp.* decision is properly understood, this case is easily distinguishable. First, the Respondents in this case made a strong showing that Amendment E had a discriminatory effect on interstate commerce. The Eighth Circuit indicated that it did not have to reach to this evidence because other evidence in the record (regarding purposeful discrimination) was so overwhelming. St. App. at 18. Thus, contrary to *Exxon Corp.* where there was "no evidence" of impermissible effect, this record demonstrated discriminatory effects—both exclusionary (tariff) and favoritism (protectionism).

Second, this case is also distinguishable because the Respondents demonstrated that Amendment E was facially discriminatory. In *Exxon Corp.*, this Court concluded that the Maryland statute was not facially discriminatory. *See Lewis*, 447 U.S. at 41-43. Thus, because the Eighth Circuit could have rested on a facial discrimination approach, the Eighth Circuit's decision is distinguishable from *Exxon Corp.*

In sum, since *Exxon Corp.* is distinguishable, there is no conflict with this decision and no basis for the Petitions.

B. Petitioners' "Discriminatory Purpose" Argument Is Flawed.

Petitioners also argue that a discriminatory purpose alone is insufficient for a court to find that a state regulatory scheme is "discriminatory". Petitioners then assert, as a minor premise of their argument, that the Eighth Circuit's decision was based "solely" on a determination of discriminatory purpose. *See* St. App. at 11. Therefore, Petitioners argue that the petition should be granted because the Eighth Circuit's decision is inconsistent with this Court's doctrine.

First, the major premise of Petitioners' argument is not supported or supportable. It is hornbook law that *discrimination* can be demonstrated any one of three ways: (1) facial discrimination; (2) discriminatory purpose; or (3) discriminatory effect. *See, e.g., Hunt v. Wash. Apple Advertising Comm'n*, 432 U.S. 333, 352 (1977); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); Erwin Chemerinsky, *Constitutional Law* 417 (2d ed. 2002); John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 661-662 (6th ed. 2000). Petitioners' mistaken argument that discrimination cannot be shown by discriminatory purpose alone is directly refuted by the *Bacchus Imports* decision. There, this Court stated:

> Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach [*i.e.*, the undue burden standard] . . .

Id., 468 U.S. at 270. *See also Hunt*, 432 U.S. at 352 (implying that purpose alone would be sufficient); *Baldwin v. Seelig*, 294 U.S. 511, 527 (1936) (the regulations were "hostile in

conception"). The major premise of Petitioners' argument, therefore, is fatally flawed.

That is not, moreover, the only weakness in Petitioners' argument. The minor premise cannot be sustained. In this case, the Eighth Circuit did not reject Respondents' theories of facial discrimination and discrimination in effect. The Eighth Circuit simply concluded that, since the evidence of discriminatory purpose was so overwhelming, it did not have to *reach* any other theory of discrimination or undue burden:

> . . . but we rest our conclusion on the evidence in the record of a discriminatory purpose underlying Amendment E. As a result, we do not consider the other two tests, or the second tier analysis, the *Pike* balancing test.

St. App. at 28. Thus, the minor premise of Petitioners' argument is also flawed. This argument does not present any basis for further review.

C. Petitioners' Argument That Some Evidence of Discriminatory Purpose Was Improper Should Be Rejected.

One of Petitioners' arguments appears to be that it was improper for the Eighth Circuit to consider sworn testimony from the drafters of Amendment E or other sponsors of the Amendment E initiative process in determining that an impermissible discriminatory purpose was underlying the enactment of the regulatory scheme. This argument flies in the face of this Court's well-settled doctrine.

Respondents' submitted at trial the testimony of the relevant decisionmakers (including the members of the drafting committee) and other Initiative sponsors under the authority of this Court's decisions in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) and *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 677 (1981) (consideration of a state Governor's "veto message" as part of the determination of discriminatory purpose). Since it was properly admitted at the trial, there was nothing improper about the Eighth Circuit's reliance on such evidence. As this Court stated just last Term: "Again, statements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative". *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003).

Amendment E was "ultimately enacted" to the detriment of interstate commerce. Some of the evidence of discriminatory purpose came from statements by the "sponsors" of Amendment E. Under this Court's ruling in *Cuyahoga Falls*, there was nothing improper about this evidence.[3] This Court should reject this argument and deny the Petitions.

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3. Respondents would note that even Petitioners do not claim that the testimony of the sponsors was the only evidence on the issue of discriminatory purpose. Respondents submitted evidence on all six factors in *Arlington Heights*. *See* 429 U.S. at 268. In particular, Respondents relied on the sequence of events, legislative history and unrebutted evidence of discriminatory effect in addition to the evidence provided by the testimony of the sponsors. This is simply not a case of discriminatory purpose proven *only* by decisionmaker testimony.

D. Conclusion.

Under the circumstances, none of Petitioners' arguments asserting "inconsistency" are sustainable. No further review by this Court would be necessary. This Court should deny the Petitions.

II. The Petitions Do Not Present An Issue Of National Constitutional Importance.

The Petitioners also argue that this case presents "important" national questions. *See, e.g.*, St. Pet. at 21. However, when the extreme nature of South Dakota's peculiar law is recognized and the narrowness of the Eighth Circuit's decision is understood, the Petitions present unremarkable questions not worthy of further review.

A. No Other State Law Is Actually "Similar" To The South Dakota Law.

Both Petitioners claim that eight other states have "similar" laws to South Dakota's Amendment E.[4] This claim is, in fact, an exaggeration and, for the following reasons, should not be credited.

1. Petitioners Exaggerate The Scope Of These Laws.

Although eight States besides South Dakota have so-called anti-corporate laws, some of these State laws do not

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4. In alphabetical order, the eight other state laws are: Iowa Code §§ 9H.1 to 9H.15; Kan. Stat. Ann. §§ 17-5902 to 17.5904; Minn. Stat. § 500.24; Mo. Rev. Stat. § 350.015; Neb. Const. Art. XII, § 8; N.D. Cent. Code §§ 10-06.1-01 to 10.06.1-27; Okla. Stat. Ann. Tit. 18 § 951; and Wis. Stat § 182.001.

generally cover the livestock industry.[5] Two states only regulate regarding the ownership of land: Kansas and Oklahoma. There are, in fact, only six State laws which purport to regulate the livestock industry as part of regulating farming or ranching.

Petitioners also exaggerate the alleged importance of this case when they omit to inform this Court that, even of the six States which generally regulate the involvement of corporations in the livestock industry, only two States (South Dakota and Nebraska) regulate through the draconian means of a State Constitutional provision. Placement of such a broad regulatory scheme in the State Constitution undercuts the normal legislative and political processes. In these two States, the normal processes—which lead to deliberation, study and compromise—have been cut off. *Cf. Romer v. Evans*, 517 U.S. 620, 631 (1996) (burdened parties can obtain protection "only by enlisting the citizenry of Colorado to amend the State Constitution . . ."); *Reitman v. Mulkey*, 387 U.S. 369, 377 (1967) (placement of state scheme in state constitution meant that it was now "embedded in the State's basic charter, immune from legislative or judicial regulation at any level of the state government."). This is an unusual burden placed on Respondents and, of course, interstate commerce. Under these circumstances, South Dakota's law is not actually "similar" in regulatory scope to the laws of any of the other States except, arguably, Nebraska.

Even regarding Nebraska, however, the Petitioners' "similarity" argument is an exaggeration. There is an important distinction between the South Dakota and

5. The state of Iowa does not generally regulate the corporate ownership of livestock; Iowa bans "any processor of beef or pork" from owning certain livestock. *See* Iowa Code § 9 H.2.

Nebraska laws as they affect the livestock industry. The Nebraska law only regulates the "front end" of the livestock industry. In Nebraska, feedlots and custom feeding operations (such as in the businesses of several Respondents) are not covered. *See, e.g.*, Opinion No. 229, 1984 Opinions of Neb. A.G., 1 (1984), 1984 W.L. 162900. In this case, South Dakota's law regulates the livestock industry from semen to slaughter—and is the broadest such scheme in the Nation. *See* St. App. at 93.

In sum, South Dakota's Amendment E regulates the livestock industry—not just land ownership. It regulates through a state constitutional mechanism—not the normal legislative process. South Dakota's Amendment E was intended as, and is, the broadest anti-corporate farming law in the Nation.

This case is not nationally important because South Dakota's law is uniquely broad and burdensome. The fate of Amendment E, therefore, has little implication, if any, for potential challenges to other state laws.

2. The Eighth Circuit's Ruling Lacks National Importance Because of Its Narrow, Fact-Specific Grounds.

This case is also not nationally important because of the way in which the Eighth Circuit analyzed the case. Although the Eighth Circuit could have struck down Amendment E on several grounds (*e.g.*, facial discrimination, discrimination in effect or as an undue burden on interstate commerce), the Court of Appeals used the narrowest possible grounds to find discrimination. Instead of plowing new doctrinal ground, the Eighth Circuit used a fact-specific, "discriminatory purpose"

analysis. The Eighth Circuit carefully scrutinized the Record to find the panoply of facts demonstrating the discriminatory purposes underlying the adoption of Amendment E. St. App. at 18-24.

The Eighth Circuit could have relied on facial discrimination or discriminatory effect. Instead it used a narrow (*i.e.*, more fact-specific) basis: the showing of discriminatory purpose. It is unlikely that any other state regulatory scheme would have a similarly overwhelming record of discriminatory purpose. The narrow grounds for the Eighth Circuit's decision, therefore, belie any of Petitioners' claims of national importance.[6]

3. Conclusion.

In sum, this case involves the broadest such state law struck down by the Eighth Circuit on the narrowest available grounds. Under these circumstances, the Eighth Circuit's analysis (while entirely proper) would be limited in its applicability to any other state law. Consequently, the Petitioner's claim of "national significance" should be recognized as an argumentative exaggeration, and this Court should deny these Petitions.

C. Petitioners "Immunity For Initiated Measures" Argument Is Flawed.

As one of their arguments, the State Petitioners claim that the Eighth Circuit's decision somehow violates the state's rights simply because the state's regulatory scheme was placed in its state constitution. This argument for national

6. The way the Eighth Circuit decided this case was a strength—not a weakness. Using the narrowest ground (when available) is a sound and common approach, consistent with an Article III court's role.

significance is fatally flawed. There is no constitutional immunity for state laws just because they are placed in the state's constitution through the initiative process. *See Reitman v. Mulkey*, *supra*, 387 U.S. at 381. In another recent example, this Court struck down a Colorado state constitutional amendment in *Romer v. Evans*, *supra*, 512 U.S. at 631. Moreover, although the State of Arkansas placed its disagreement with this Court's decisions in its constitution, the state's defiance was not immunized against the principles of the federal constitution. *See Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

Similarly here, just because the South Dakota's disagreement with the principles of this Court's dormant Commerce Clause doctrine was placed in its state constitution by the Initiative process does not immunize the petitioners' position. Under these circumstances, no further review by this Court is necessary, and this Court should deny the Petitions.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petitions.

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No. 03-1111

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In The

Supreme Court of the United States

THE SOUTH DAKOTA SECRETARY OF STATE
AND THE SOUTH DAKOTA ATTORNEY GENERAL,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Respondents' Brief in Opposition contends that the decision below is unremarkable and is consistent with decisions of other federal appellate courts. Yet, the court of appeals decision conflicts with this Court's commerce clause opinions. Cases from this Court list "discriminatory purpose" as one of the three stated bases for finding that a statute violates the dormant commerce clause, but not one actually relies on "discriminatory purpose" as the sole reason for doing so. In relying only on discriminatory purpose, the court of appeals decision conflicts with the more thorough analysis made by this Court on dormant commerce clause questions.

Respondents also argue that the case below does not present a matter of national constitutional importance because it only involves a few state laws with corporate farming statutes, none of which are as "draconian" as South Dakota law. The breadth of the court of appeals decision is, however, far-reaching in terms of both commerce clause constitutional analysis and corporate farming law.

I. THE QUESTIONS PRESENTED SEEK REVIEW OF A CONFLICT WITH THIS COURT'S DORMANT COMMERCE CLAUSE JURISPRUDENCE.

The Petition asserts that the court of appeals decision was flawed in holding (a) that a state law directed at two specific out-of-state companies is wrongfully discriminatory against interstate commerce and (b) that the purpose of a state law (as derived from the subjective intent of the

drafters) may, on its own, be sufficient cause to invalidate a state law under the dormant commerce clause.

The Respondents contend that the first of the arguments is wrong in relying on *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978). FB Brf. 11, 12.

The Petition relies on the Court's explanation in *Exxon*, that the "Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-28. Pet. 12, 13. The court of appeals held that Amendment E was unlawful because its purpose or intent was to target two specific out-of-state companies.[1] Thus, the court of appeals conclusion directly conflicts with the above-quoted statement in *Exxon*.

Respondents attempt to distinguish *Exxon* by claiming that the Petition relies on dicta, that "any principle derived from *Exxon* has been narrowed over time," and that scholars do not regard it in the light presented in the Petition. Yet, the Court does not appear to regard this point as dicta and it has not been narrowed. The Court restated the premise in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (pointing out that in *Exxon*, "We stressed that the Commerce Clause 'protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'"). In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987), the

[1] The two companies are Murphy Farms, Inc. and Tyson, Inc. The companies have been involved in numerous pollution and production contract disputes listed in the Petition. *See also Tyson Foods, Inc. v. Archer, et al.*, No. 03-649, 2004 WL 308127 (Ark. Feb. 19, 2004) (production contract dispute).

Court held that the "fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 580 n.13 (1997) (citing to *Exxon* and *CTS Corp.*). Various courts of appeal have also relied on the *Exxon* language in recent cases. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 213 (2d Cir. 2003); *Pharmaceutical Research and Mfrs. of America v. Concannon*, 249 F.3d 66, 84 (1st Cir. 2001); *Texas Manufactured Housing Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095, 1104 (5th Cir. 1996); *Kleenwell Biohazard Waste & General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 397 (9th Cir. 1995); *Ford Motor Co. v. Insurance Comm'r of Com. of Pennsylvania*, 874 F.2d 926, 944 (3d Cir. 1989). The Petitioners submit that the language in *Exxon* is still vital and supports granting review.

Respondents also take exception to the second part of the Petitioners' "purpose" argument – that discriminatory purpose should not be (and has not been) the sole criterion for determining whether a law is invalid under the dormant commerce clause. Respondents suggest that *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984) and other recent cases demonstrate that state legislation may be invalidated solely on the basis of "discriminatory purpose."

It is undeniable that *Bacchus* and other dormant commerce clause cases list "discriminatory purpose" as one of the stated bases for finding that a statute violates the dormant commerce clause. Yet, not one of the cases that does so actually lists "discriminatory purpose" as the *sole reason* for finding a state law unconstitutional. In *Bacchus*, for example, another facet of the test (discriminatory language of the act itself) applied and the parties conceded

that to be the case. Petitioners submit that discriminatory intent alone is inadequate to invalidate Amendment E under the dormant commerce clause.

With respect to Petitioners' second claim, Respondents also appear to make an alternative argument, reasoning that Amendment E is unconstitutional due to *both* its discriminatory intent and its effect on interstate commerce. They claim that "the Respondents in this case made a strong showing that Amendment E had a discriminatory effect on interstate commerce." FB Brf. 12. The Opposition Brief further alleges that Amendment E had an "adverse impact" on interstate commerce and argues that such effect was "substantial and far-reaching." FB Brf. 6, 7.

Yet, Respondents acknowledge (as they must) that the court of appeals did not look at the effect of the challenged law on interstate commerce at all. FB Brf. 12. The court of appeals did not consider interstate effect (or even the language of Amendment E) when it held "we rest our conclusion on the evidence in the record of a discriminatory purpose underlying Amendment E. As a result, we do not consider the other two tests, or the second tier analysis, the *Pike* balancing test." App. 18.

Respondents suggest that the court of appeals did not actually reject any of Respondents' claims that the challenged law had an adverse effect on interstate commerce. Reasoning that the court of appeals simply did not reach those claims (FB Brf. 14), Respondents appear to argue that they would be successful if the effect on interstate commerce had been examined. The "right for the wrong reason" salvage simply does not cure the problem: the

court of appeals relied on a flawed premise in conducting its constitutional analysis and it ought to be corrected.

II. THE QUESTIONS PRESENTED ARE NOT NARROW AND APPLY TO MORE THAN CONSIDERATION OF A UNIQUE SOUTH DAKOTA LAW.

Respondents argue that the case does not present a matter of national constitutional importance because it involves only a few states with corporate farming statutes, none of which are as "draconian" as South Dakota law. The breadth of the Eighth Circuit's decision in the case below is, however, far-reaching in terms of commerce clause constitutional analysis, and in the analysis of corporate farming statutes.

As set forth above, a critical question is whether a state law should be struck down solely on the strength of discriminatory purpose (subjective intent of the drafters). That issue alone has far-reaching significance. In the last twenty-five years, the Court has heard many cases on the dormant commerce clause involving matters in commerce such as solid waste, milk, liquor taxes, natural gas, and youth camps.[2] Cases involving the extent to which the states may regulate the scope of corporate conduct have, for example, involved a state law prohibiting processors and wholesalers from engaging in retail business (*Exxon*) and a law restricting the method for hostile takeovers. *CTS Corp.*, 481 U.S. 69. Each of these cases involve the

[2] *C&A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1944); *Clover Leaf Creamery; Bacchus; General Motors Corp. v. Tracy,* 519 U.S. 278 (1997); *Camps Newfound/Owatonna.*

same basic three-part dormant commerce clause test, but none have concluded that discriminatory intent alone is enough to invalidate state laws. Given the demonstrated breadth of the dormant commerce clause and its effect on business activities, the Questions Presented are far-reaching and are not limited to unique South Dakota laws.

Further, as stated in the Petition, the Questions Presented involve the extent to which states may restrict corporations in engaging in farming, owning farmland, or producing livestock. There are several states with various corporate farming provisions,[3] but none of the state corporate farming provisions have been analyzed under the dormant commerce clause by any appellate court except the Eighth Circuit. Because the Eighth Circuit is using a flawed test for analyzing corporate farming provisions, now is the time to ensure that the proper test is used before other state corporate farming provisions are analyzed in light of the Eighth Circuit criteria. While other state provisions may be somewhat less restrictive toward corporate farming,[4] the standard used by the Eighth

[3] Respondents assert that the South Dakota Attorney General was not candid in disclosing whether the provisions in other states are statutes or constitutional provisions. Yet, the Petition clearly cites to these state provisions. Pet. 3 n.3. There is one exception that was corrected and disclosed to all parties. When filed, the Petition erroneously referred to the North Dakota provision as a constitutional provision. Pet. 2. The word "statutory" was substituted in all copies of the Petition within days after the Petition was filed.

[4] Respondents assert that the South Dakota Attorney General exaggerated the scope of other state provisions. The Petition explains that the other state provisions are similar in that they restrict corporations from engaging in farming or owning farmland and does not suggest that other state laws are as restrictive as Amendment E or identical to Amendment E.

Circuit does not consider that issue. The Eighth Circuit simply considers whether the parties drafting the provision intended to discriminate against interstate commerce and does not analyze whether the provision actually does discriminate against interstate commerce. Consequently, under the Eighth Circuit criteria the relative scope of the restrictions would not be the deciding factor; the deciding factor would be the relative intent of the drafters. If the Eighth Circuit decision serves as precedent, other state corporate farming laws may be struck down if one or more drafters in those states intended to restrict interstate commerce, regardless of the language or effect of the actual provisions.

CONCLUSION

For the foregoing reasons and those in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Nos. 03-1108 and 03-1111

In the
Supreme Court of the United States

DAKOTA RURAL ACTION, *et al.*,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,

Respondents.

CHRIS NELSON, SECRETARY OF STATE OF SOUTH DAKOTA, *et al.*,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* NATIONAL FARMERS UNION, SOUTH DAKOTA FARMERS UNION, NORTH DAKOTA FARMERS UNION, MINNESOTA FARMERS UNION, IOWA FARMERS UNION, CAMPAIGN FOR FAMILY FARMS, WESTERN ORGANIZATION OF RESOURCE COUNCILS, DAKOTA RESOURCE COUNCIL, NATIONAL FAMILY FARM COALITION, AND FRIENDS OF THE CONSTITUTION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, National Farmers Union, South Dakota Farmers Union, North Dakota Farmers Union, Minnesota Farmers Union, Iowa Farmers Union, Campaign For Family Farms, Western Organization of Resource Councils, Dakota Resource Council, National Family Farm Coalition, and Friends of the Constitution (collectively, "*Amici Curiae*") respectfully move for leave to file the accompanying brief as *Amici Curiae* in support of the Petitions for Writ of Certiorari filed by Petitioners the South Dakota Secretary of State, *et al.* and Dakota Rural Action, *et al.* Petitioners have consented to the filing of this brief; their letters of consent have been lodged with the Clerk of the Court. Counsel for Respondents have not consented to the filing of this *amici curiae* brief, necessitating this motion.

Amici Curiae represent 76 farmer-based organizations representing several hundred thousand members who have advocated for many years for the preservation and strengthening of the family farm system of agriculture and rural communities across the nation. *Amici Curiae* support granting the two petitions in this case. They write separately in order to emphasize the broad importance of this case by articulating the concerns of farmers and rural communities in a multitude of other states with similar laws restricting corporate participation in agriculture.

Amici Curiae are concerned about the potential ramifications if this case is left unreviewed by this Court. The Eighth Circuit Court of Appeals struck down South Dakota's constitutional amendment, known as Amendment E, restricting corporations from farming or having an interest in farmland. This decision threatens states' legitimate attempts to foster the family farm system of agriculture and puts rural communities at risk. The Eighth Circuit's decision would

leave vulnerable to dormant Commerce Clause challenge many other important state laws regulating corporate engagement in agriculture. *Amici Curiae* have worked to enact and protect state laws like Amendment E that support family farmers; they therefore have an interest in supporting the Petitions for Writ of Certiorari.

In light of the important issues being raised in this case, *Amici Curiae* respectfully request that their Motion for Leave to File Brief of *Amici Curiae* be granted.

Respectfully Submitted,

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February 24, 2004

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici Curiae have an interest in this case because these 76 farmer-based organizations and their several hundred thousand members believe in preserving the family farm system of agriculture.

National Farmers Union (NFU), officially called the Farmers Educational and Cooperative Union of America, was founded in 1902. NFU is a general farm organization with a membership of nearly 250,000 farm and ranch families throughout the United States. NFU is a federation, with the presidents of the 23 state and one regional (covering three states) Farmers Union organizations serving as its board of directors. For more than 100 years, NFU's primary goal has been to sustain and strengthen family farm and ranch agriculture. NFU believes that a vibrant agricultural sector is the foundation for strong farm and ranch families and thriving rural communities, which are, in turn, vital to the health and economic well being of the entire U.S. economy.

South Dakota Farmers Union (SDFU) is a grassroots membership organization that serves the needs of rural South Dakota. SDFU has been the voice of the family farm in South Dakota for nearly a century, acting as the farmers' "hired hand" in the halls of state and federal government. SDFU's mission is to preserve the family farm, ranch, and rural communities. Building on a foundation of education, legislation, and cooperation, SDFU has provided guidance and support for farmers, small businesses, and rural communities throughout the state. SDFU is a member of National Farmers Union.

Founded in 1927, North Dakota Farmers Union

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

(NDFU) is a producer-controlled organization dedicated to serving its 37,000 North Dakota family members. NDFU is committed to providing effective grassroots leadership in rural America. NDFU believes that the family farm system of agriculture is the only way to ensure rural and urban stability, national prosperity, the preservation of human and natural resources, and the dignity of the individual and the family. NDFU is a member of National Farmers Union.

Minnesota Farmers Union (MFU) is a non-profit membership-based organization with approximately 23,400 members, about 95 percent of whom are Minnesota farmers. Founded in 1929, MFU works to protect and enhance the economic interests and quality of life of family farmers and ranchers in rural communities. MFU has lobbied at the Minnesota legislature to protect Minnesota's corporate farming law, Minn. Stat. § 500.24, which restricts non-family corporations from farming in Minnesota. This law is important to MFU's family farmer members who endeavor to sustain a strong economy and healthy environment in rural Minnesota. MFU is a member of National Farmers Union.

Iowa Farmers Union (IFU) is a non-profit advocacy group representing family farmers across the state of Iowa. IFU's mission is to promote a viable system of sustainable agriculture and a high quality of life in rural communities through education of farmers, rural residents, and urban consumers; cooperation among farmers; and community activism. IFU has worked to preserve Iowa's restrictions on corporate ownership of farmland and livestock by, among other things, joining with other farm organizations in submitting *amici curiae* briefs in support of Iowa's corporate farming law. *See Smithfield Foods, Inc. v. Miller,* 241 F. Supp. 2d 978 (S.D. Iowa. 2003), *appeal pending,* No. 03-1411 (8th Cir.). IFU is a member of National Farmers Union.

The Campaign for Family Farms (CFF) is an unincorporated association of family farm and community

membership organizations comprised of the Land Stewardship Project (Minnesota), Iowa Citizens for Community Improvement, Missouri Rural Crisis Center, Illinois Stewardship Alliance, and Citizens Action Coalition of Indiana. CFF and its member organizations work to foster an ethic of stewardship for farmland, promote sustainable agriculture, and develop sustainable communities. They seek to develop and implement farm policies, farming practices, and marketing systems that help family farms and rural communities thrive. CFF works for thousands of family farmers who raise livestock and crops and who believe family farming is an important element of the economies and environment of rural communities. CFF and its organizations believe anti-corporate farming laws, which prohibit non-family corporations from farming, are an important part of state policy supporting family farming and may be put in question by the ruling in this case. On behalf of independent hog farmers, CFF has brought a constitutional claim to end the mandatory pork checkoff program. *See Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157 (6th Cir. 2003), *petition for cert. filed,* (U.S. Feb. 19, 2004) (No. 03-1180).

The Western Organization of Resource Councils (WORC) is a network of grassroots organizations from seven states that includes 8,250 members and 49 local community groups. WORC's seven state organizations are: the Dakota Resource Council (North Dakota), Dakota Rural Action[2] (South Dakota), the Idaho Rural Council, the Northern Plains Resource Council (Montana), Oregon Rural Action, the Powder River Basin Resource Council (Wyoming), and the Western Colorado Congress. WORC's mission is to advance the vision of a democratic, sustainable, and just society

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[2] Dakota Rural Action is a Petitioner in this case. Neither Dakota Rural Action nor its counsel authored in whole or in part this brief, and Dakota Rural Action did not make a monetary contribution to the preparation or submission of this brief.

through community action. WORC is committed to building environmentally and economically sustainable communities that balance economic growth with the health of people and stewardship of their land, water, and air resources. On behalf of independent cattle farmers and ranchers, WORC has brought a constitutional claim to end the mandatory beef checkoff program. *See Livestock Mktg. Ass'n v. USDA,* 335 F.3d 711 (8th Cir. 2003), *petitions for cert. filed,* (U.S. Feb. 13, 2004) (Nos. 03-1164 and 03-1165).

Dakota Resource Council (DRC) is a grassroots organization formed in 1978 to protect North Dakota's land, air, water, rural communities, and agricultural economy. DRC is working for preservation of family farms, enforcement of corporate farming laws, protection of groundwater and clean air, and renewable energy. DRC's mission is to form enduring, democratic local groups that empower people to influence decision-making processes that affect their lives.

Formed in 1986, the National Family Farm Coalition (NFFC) represents 30 grassroots farm and rural advocacy organizations in more than 27 states committed to preserving and enhancing a family farm food production system in the United States. NFFC's work includes education, outreach, and advocacy for stable rural communities, safe food, and the preservation of natural resources through family farming.

Friends of the Constitution is a 19–member coalition of farm, church, and environmental groups concerned about corporate farming. The groups have joined together to defend and enforce Initiative 300, the Nebraska constitutional amendment banning non-family farm corporations, which was adopted by the citizens of Nebraska in 1982. Friends of the Constitution's member groups are: American Corn Growers Association; Citizens for Air, Resources and Environment (CARE); Center for Rural Affairs; Custer County Sustainable Agriculture Society; League of Rural Voters; Mid-Nebraska PRIDE; Nebraska Appleseed Center

for Law in the Public Interest; Nebraska Catholic Conference; Nebraska Chapter—Sierra Club; Nebraska Grange; Nebraska Lutheran Advocacy; Nebraska Farmers Organization; Nebraska Farmers Union, which is a member of National Farmers Union; Nebraska Wildlife Federation; Nebraska—Worth Fighting For; Northeast Nebraska Ag Support Group; Saunders County Livestock; Save Our Rural Resources (SORR); and Women Involved in Farm Economics (WIFE).

Amici Curiae have sought to enact and protect state laws that support family farmers and therefore have an interest in seeking that this Court grant the Petitions for Writ of Certiorari and reverse the Eighth Circuit's decision, which is incorrect as a matter of law and is inconsistent with Supreme Court precedent.

SUMMARY OF THE ARGUMENT

Rural America has seen significant changes over the past several decades. With the rise of concentration and vertical integration in agriculture, farming has become increasingly industrialized. While the number of farms has fallen dramatically, the size of farms has increased. In an attempt to address the adverse effects this trend has had on rural communities, states and citizens have enacted laws and constitutional amendments that, to varying levels, regulate or restrict corporations from owning farmland or engaging in farming. South Dakota's constitutional amendment, known as "Amendment E," was passed in 1998 by 59 percent of those voting in the referendum, and similarly addresses problems caused by corporate agriculture. In analyzing whether Amendment E violates the dormant Commerce Clause, the Eighth Circuit did not consider whether the text of the amendment discriminated against out-of-state interests, or whether it had a discriminatory effect, but rather viewed and weighed evidence of the intent of the proponents of the

amendment. Based only on evidence that the proponents' purpose in supporting Amendment E was to ensure that rural South Dakota did not suffer the same environmental, economic, and sociological problems as other states with concentrated industrial agriculture, the court reviewed Amendment E with strict scrutiny. The Eighth Circuit erred by applying a strict scrutiny standard based solely on evidence of discriminatory intent when the amendment did not discriminate on its face or in effect. This Court's dormant Commerce Clause decisions have not applied a strict scrutiny standard based on discriminatory intent alone.

Because Amendment E treats all corporations the same, whether based in or outside South Dakota, the Eighth Circuit should have balanced South Dakota's legitimate interest in choosing the type of agriculture it wishes to foster with any incidental burdens on interstate commerce. If the proper balancing test were applied, Amendment E would fall in line with a host of other state regulations that have been upheld as legitimate. The states' ability to regulate agriculture and ensure continued viability of rural communities will be jeopardized unless this Court grants the petitions of the South Dakota Secretary of State, *et al.*, and Dakota Rural Action, *et al.* and reverses the Eighth Circuit's erroneous decision.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW WEAKENS STATES' AND CITIZENS' EFFORTS TO PRESERVE THE FAMILY FARM SYSTEM NATIONWIDE

This Court should grant the two petitions in this case because leaving intact the decision below weakens states' and citizens' efforts to preserve the family farm in South Dakota and throughout the nation. By striking down South Dakota's constitutional amendment restricting corporations from farming or having an interest in farmland (with certain

exceptions), the Eighth Circuit's decision undermines the family farm to the detriment of rural communities.

For-profit corporations are creatures of state laws designed to allocate capital in what is deemed the most "efficient" manner without regard to communities, neighborhoods, and families. *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting) ("Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State."). In contrast, family farms, and the families that operate them, strive for different goals: building sustainable rural communities, promoting responsible stewardship of soil, water, and other resources, and ensuring through family ownership that land can be farmed by future generations. *See, e.g.,* Marty Strange, *Family Farming: A New Economic Vision* 32-42 (1988). *Amici Curiae* believe that allowing corporations to enter into farming in South Dakota, and potentially in other states, would undermine family farms and the rural communities that these organizations have advocated to preserve and strengthen. *See* Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N. Dak. L. Rev. 449, 494-95 (1999) (noting state anti-corporate farming laws enhance farmers' bargaining power).

If the Eighth Circuit's decision is not reversed, it could open the floodgates to challenges of state laws that restrict, to varying degrees, corporations from engaging in farming and owning agriculture land in eight other states. *See* Iowa Code §§ 9H.1 to 9H.15; Kan. Stat. Ann. §§ 17-5902 to 17.5904; Minn. Stat. § 500.24; Mo. Rev. Stat. § 350.015; Neb. Const. Art. XII, § 8; N.D. Cent. Code §§ 10-06.1-01 to 10.06.1-27; Okla. Const. Art. XXII, § 2; and Wis. Stat. § 182.001. These laws — or some version of them — have

been in place for decades, including North Dakota's anti-corporate farm statute, which was first enacted in 1932, and South Dakota's Family Farm Act of 1974. *See* S.D. Codified Laws §§ 47-9A-1 to 47-9A-23; N.D. Cent. Code §§ 10-06.1-01 to 10.06.1-27. These laws are necessary for a number of reasons, but the overarching reason—the protection of family farms—was succinctly articulated by the Minnesota legislature in the purpose section of that state's anti-corporate farming law:

> The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.

Minn. Stat. § 500.24, subd. 1.

The threat to family farming addressed by these laws may best be illustrated by considering the dramatic consequences of concentration and consolidation of corporate power in the hog industry over the past two decades. USDA statistics show the steady exit of independent hog farmers from the hog industry in the past 20 years. In the mid-1980s, there were approximately 500,000 hog farms in the nation; as of year-end 2002, the number had shrunk to 75,350 hog operations. USDA National Agricultural Statistics Service Quarterly, *Hogs and Pigs Report* (Dec. 30, 2002), *available at* http://jan.mannlib.cornell.edu/reports/nassr/livestock/phpbb/2002/hgpg1202.txt. Large corporate interests are replacing independent family hog farms. While the number of hog farms has declined, the total number of hogs produced has remained relatively stable, resulting in increasingly large hog operations. William D. McBride & Nigel Key, *Economic and Structural Relationships in U.S. Hog Production-*

Agricultural Economic Report No. 818, 5 (Feb. 2003), *available at* http://www.ers.usda.gov/publications/aer818/aer818.pdf. Those farmers who do raise hogs are increasingly raising them not as independent producers but on behalf of others, usually a packer or packer affiliate. A 2002 study shows that more than 83 percent of hogs were committed to packers before slaughter through packer ownership or contractual arrangements, up from 38 percent in 1994. University of Missouri and National Pork Board, *Hog Marketing Contract Study* (Jan. 2002), *available at* http://agebb.missouri.edu/mkt/vertstud.htm.

The shift toward vertical integration and corporate ownership of livestock has had devastating economic effects on independent family farmers and their rural communities. As packer ownership and control of hogs increases and the number of packers shrinks,[3] independent hog farmers find themselves without a competitive market in which to sell their hogs. Packers owning or controlling hogs have less need of an independent farmer's relatively small number of hogs. Independent hog farmers are unable to find buyers willing to pay a competitive price for their hogs, driving them out of business or into unfavorable contracts with packers.[4] *See, e.g.*, Neil E. Harl, *The Structural Transformation of Agriculture* 4-

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[3] In 2000, four firms controlled 56 percent of the nation's hog processing industry. USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001*, 18, 38 (June 2002), *available at* http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf.

[4] At least one study has shown that prices paid to independent hog producers decrease as packers' control of production increases. That study found that at the "10 percent level of integration, the price paid to independents declines by six percent. At 50 percent integration, the price declines by about 26 percent." Azzadine M. Azzam & Allen C. Wellman, *Packer Integration into Hog Production: Current Status and Likely Impacts of Increased Vertical Control on Hog Prices and Quantities*, University of Nebraska Agriculture Research Bulletin 315-F (1992).

5 (March 20, 2003), *available at* http://www.econ.iastate .edu/faculty/harl/StructuralTransformationofAg.pdf.

This trend of losing family farms while the size of farms has expanded extends well beyond the hog industry. The number of farmers in the United States fell from 6.8 million in 1935 to less than 2 million in 1997, while the average farm size has more than doubled from 155 acres in 1935 to 487 acres in 1997. Robert A. Hoppe, *Structural and Financial Characteristics of U.S. Farms: 2001 Family Farm Report*, ERS Agriculture Information Bulletin No. 768, 6-7 (May 2001), *available at* http://www.ers.usda.gov/ publications/aib768/aib768.pdf. Following this trend, South Dakota lost 14 percent of its farms between 1980 and 2001. USDA, South Dakota Agric. Statistics Serv., *South Dakota Farms, Land in Farms, and Livestock Farms* (Feb. 22, 2002), *available at* http://www.nass.usda.gov/sd/releases /farm0202.pdf.

The loss of independent family farmers has a ripple effect on rural communities. Studies have consistently shown that independent family farms contribute significantly more to healthy rural communities than do corporate-owned farms. As early as the 1940s, at the direction of the U.S. Senate, anthropologist Dr. Walter Goldschmidt compared two rural California communities in which the structure and size of farms were different, but the total value of farm production was almost identical. Walter Goldschmidt, *Small Business and the Community: A Study in the Central Valley of California on Effects of Scale of Farm Operations*, reprinted by Senate Special Committee to Study Problems of American Small Business, 79th Cong., 2d Sess., Report of the Special Committee 13 (Comm. Print. 1946). Goldschmidt concluded from his research that residents of the community with larger, industrialized farms realized a lower standard of living and quality of life compared to the residents of the community with smaller farms. *Id.*

A recent study comparing agriculture-dependent counties in states with anti-corporate farming laws, such as South Dakota, to those without such laws, found that agriculture-dependent counties in states with anti-corporate farm laws had fewer families in poverty, lower unemployment, and a higher percentage of farms realizing cash gains. Dr. Rick Welsh & Dr. Thomas A. Lyson, *Anti-Corporate Farming Laws, The "Goldschmidt Hypothesis" and Rural Community Welfare* 10-12 (2002), *available at* http://www.i300.org/I-300%20report.PDF. Another recent study concluded that areas with greater concentrations of family farms produce better health and socioeconomic conditions for children, as compared to areas with greater concentrations of industrial agriculture, which produce worse health and socioeconomic conditions for children. David J. Peters, *Revisiting the Goldschmidt Hypothesis: The Effect of Economic Structure on Socioeconomic Conditions in the Rural Midwest,* Missouri Economic Research and Information Center, P-0702-1 (July 2002), *available at* http:// www.missourifarmersunion.org/conf03/goldschmidt03.pdf.

The United States Department of Agriculture (USDA) similarly has recognized the benefits of family farms:

> Small farms contribute more than farm production to our society. Small farms embody a diversity of ownership, cropping systems, landscapes, biological organization, culture, and traditions. Since the majority of farmland is managed by a large number of small farm operators, the responsible management of soil, water, and wildlife encompassed by these farms produces significant environmental benefits. Decentralized land ownership produces more equitable economic opportunity for people in rural communities, and offers self-employment and business management opportunities. Farms,

> particularly family farms, can be nurturing places for children to grow up and acquire the values of responsibility and hard work.

A Time to Act: A Report of the USDA National Commission on Small Farms 8 (Jan. 1998), *available at* http://www.reeusda.gov/smallfarm/smlfrm1.pdf.

The loss of family farms inevitably leaves rural communities with lower overall incomes and an increase in poverty. *See generally,* Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Services Practitioners*, 29 Clearinghouse Rev. 1087, 1089-91 (April 1996). Rural development experts have estimated that for every five to seven farms that go out of business, one business in the rural community closes. Osha Gray Davidson, *Broken Heartland: The Rise of America's Rural Ghetto* 57 (1990). Loss of competitive markets, lower incomes, increased unemployment, and an increase in poverty rates are of significant interest to the state, since they result in lower state tax revenues and increase a state's burden to respond to its citizens living in poverty. Similarly, degradation of health and socioeconomic conditions for children is undeniably a matter of interest to the state. South Dakota thus has a significant interest in ensuring that its rural communities remain vibrant by preserving the continued existence of independent family farmers. The means South Dakota chose to defend those interests, reasonable restrictions on corporate agriculture, have been shown to be effective. The Eighth Circuit's decision wrongly deprives states of an important tool for fostering healthy rural communities.

II. THE PETITIONS PRESENT IMPORTANT QUESTIONS REGARDING THE REACH OF THE DORMANT COMMERCE CLAUSE

In subjecting Amendment E to strict scrutiny solely because it found evidence of a discriminatory purpose, the

Eighth Circuit failed to follow this Court's prior decisions, and extended the dormant Commerce Clause doctrine beyond the bounds established by this Court's precedent. This expansion of the dormant Commerce Clause doctrine, if left unreviewed by this Court, leaves vulnerable a multitude of state laws concerning agriculture that hitherto have been considered well within the penumbra of legitimate state legislation. Indeed, if the test used by the Eighth Circuit is allowed to stand, and courts invalidate all state legislation enacted with any evidence of a "discriminatory" purpose — *i.e.*, evidence that the legislation is designed to have local benefits — without undertaking the traditional balancing of those benefits with the burden placed on interstate commerce, the result would be a *per se* finding of unconstitutionality of most state legislation. Such a restriction on the states' domain elevates the importance of the questions presented and weighs strongly in favor of granting the present petition.

This Court has long employed a two-step approach in analyzing state regulation of commerce. If a state regulation "discriminate[s] against interstate commerce 'either on its face or in practical effect,'" the regulation will be invalidated unless the state demonstrates "both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)); *see also*, *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). If, on the other hand, a regulation "regulates evenhandedly, to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also, Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Whether a state

regulation runs afoul of the dormant Commerce Clause largely depends on whether it falls in the first analytical "tier," subjecting the regulation to strict scrutiny, or whether it will be analyzed under the *Pike* balancing test.

The Eighth Circuit incorrectly applied first "tier" strict scrutiny to Amendment E. The language of Amendment E is neutral on its face. It states in relevant part: "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." S.D. Const. Art. XVII, §21.[5] Amendment E also regulates evenhandedly: it prohibits *all* non-farm corporations, regardless of where they were formed or currently operate, from farming or owning farmland in South Dakota. Because Amendment E discriminates neither on its face nor in effect, the Eighth Circuit should have reviewed it under the second "tier" *Pike* balancing test, as the district court did below.

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[5] By disregarding the nondiscriminatory language of the constitutional amendment entirely, the Eighth Circuit also disregarded one of the most basic tenets of statutory interpretation, namely, that the most reliable source for determining legislative intent is the language of the legislation itself. This Court has observed: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). The Eighth Circuit likewise has emphasized this principle, holding that when "statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative." *Northern States Power Co. v. United States,* 73 F.3d 764, 766 (8th Cir. 1996).

The Eighth Circuit's decision directly conflicts with this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). In an attempt to address problems resulting from vertical integration in the petroleum industry within the state, the Maryland legislature prohibited petroleum producers or refiners from operating retail gas stations in Maryland. This Court upheld the statute, even though there were no producers or refiners in the state and the burden of the prohibition fell solely on out-of-state companies. *Id.* at 125. This Court found that the law treated out-of-state corporations the same as in-state corporations:

> While the refiners will no longer enjoy the same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

Id. at 126. This Court also rejected the argument that the regulation impermissibly burdened interstate commerce, observing that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-28, citing *Hughes v. Alexander Scrap Corp.*, 426 U.S. 794, 806 (1976). Maryland's statute prohibiting producers and refiners from operating gas stations in Maryland thus was upheld as a valid exercise of the state's authority to address problems relating to its gasoline market.

This Court's *Exxon* decision is in line with its other dormant Commerce Clause cases holding that state laws that regulate evenhandedly, even though they have some effect on interstate commerce, must be upheld unless the burden on interstate commerce "clearly outweighs the State's legitimate

purpose." *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (rejecting a dormant Commerce Clause challenge to a Minnesota statute banning the sale of retail milk in plastic, nonrefillable containers because the statute "regulates evenhandedly" by prohibiting all milk retailers from selling such products, and the state had an interest in conserving energy and natural resources); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (upholding an Indiana corporate takeover law that applied to all hostile tender offers even though its application would fall most often on out-of-state companies).[6]

By disregarding Amendment E's neutral language and its evenhanded application, the Eighth Circuit failed to properly balance South Dakota's legitimate interest in choosing the form of agriculture it wishes to promote, reversing the tide of decades of precedent. When courts, including this Court, have considered the states' legitimate interests, they have upheld similar state restrictions on corporate agriculture. *See Asbury Hospital v. Cass County*, 326 U.S. 207, 214-15 (1945) (rejecting an Equal Protection challenge to a North Dakota statute barring all corporations, except cooperatives, from owning farmland, holding the statute is an appropriate application of a state policy against the concentration of farming lands in corporate ownership); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d

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[6] This Court has also noted that the existence of in-state corporations that would be adversely affected is a "powerful safeguard against legislative abuse." *Clover Leaf Creamery*, 449 U.S. at 473 n. 17, citing *South Carolina Highway Dept. v. Barnwell Bros., Inc.* 303 U.S. 177, 187 (1938). South Dakota corporations are just as adversely affected by Amendment E as out-of-state corporations. For example, IBP, until it was acquired by Tyson, was a South Dakota-based company subject to the restrictions in Amendment E just like any other corporation. *See generally*, David R. Moeller, *The Problem of Agricultural Concentration: The Case of the Tyson-IBP Merger*, 8 Drake J. Agric. L. 33 (Spring 2003).

801, 805-06 (Mo. 1988) (rejecting an Equal Protection challenge to Missouri's restriction on corporate ownership of farmland, holding it serves a legitimate state interest and that without the restriction the legislature could not protect traditional farming communities). The Eighth Circuit itself denied an Equal Protection challenge to Nebraska Initiative 300 (after which South Dakota's Amendment E was patterned) that prohibits non-family farm corporations from owning and operating Nebraska farm and ranch land, holding:

> The people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land. It is not for the courts to second-guess the wisdom of this judgment.

MSM Farms, Inc. v. Spire, 927 F.2d 330, 335 (8th Cir. 1991).

Cases in which courts did balance the state's interests in fostering family farms and rural communities when state regulations were challenged under the dormant Commerce Clause have found those interests outweigh any burdens placed on interstate commerce. *See, e.g., Parker v. Brown*, 317 U.S. 341, 362-63 (1943) (upholding California's raisin marketing order "because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities . . ."); *Hampton Feedlot v. Nixon,* 249 F.3d 814, 820 (8th Cir. 2001) (upholding Missouri's livestock price discrimination law, concluding: "The Missouri legislature has the authority to determine the course of its farming economy, and this measure is a constitutional means of doing so. We have no doubt that the state considered the potential harms and benefits to all stakeholders in creating its price discrimination law."); *see also, Pacific States Box & Basket Co. v. White,*

296 U.S. 176, 181, 184 (1935) (upholding state regulation of transportation of produce, stating: "The power of a State to proscribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to *prevent unfair competition* is conceded.") (emphasis added).

As demonstrated in Petitioners' briefs and recognized by the district court in this case, South Dakota has legitimate reasons for enacting Amendment E. *See South Dakota Farm Bureau v. Hazeltine*, 202 F. Supp. 2d 1020, 1047 (D.S.D. 2002) (finding the express purpose of Amendment E is "to retain family farms and to prevent limited liability entities, regardless of their home base, from gaining control of the food supply."); *see also, supra,* 6-12. The Eighth Circuit erred by applying first "tier" strict scrutiny to Amendment E, which is neutral on its face and in effect. If allowed to stand, courts will begin to apply the test used by the Eighth Circuit in this case to state regulations that do not discriminate on their face or in effect based on minimal evidence of discriminatory intent, rather than balancing the states' legitimate interests with the burden imposed on interstate commerce. The result would be a significant encroachment on states' interests in enacting what have long been held to be legitimate and constitutional regulations for the health and benefit of their rural communities.

The Eighth Circuit's holding in this case that strict scrutiny could be triggered solely by a finding of discriminatory purpose also expands the reach of the dormant Commerce Clause beyond the boundaries of dormant Commerce Clause jurisprudence as applied by this Court. Citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), the court said that if a law "has a discriminatory purpose," that is an "indicator of discrimination against out-of-state interests," thus triggering strict scrutiny. *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 593 (8th

Cir. 2003). Neither *Bacchus* nor the other cases relied on by the Eighth Circuit have actually applied a strict scrutiny standard based solely on a "discriminatory purpose." In all of those cases, the regulation at issue either discriminated on its face or in effect. *See Bacchus*, 468 U.S. at 271 (regulation was passed with an undisputed discriminatory purpose, but also discriminated on its face and in effect); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977) (statute had the "practical effect" of discriminating against Washington apple growers and dealers while leaving North Carolina apple producers unaffected); *Waste Sys. Corp. v. County of Martin,* 985 F.2d 1381, 1386-87 (8th Cir. 1993) (ordinance discriminated on its face and in effect); *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995) (referendum discriminated in effect). Indeed, even where there existed evidence that a regulation was passed with discriminatory motives, this Court refused to apply strict scrutiny where the regulation did not discriminate on its face and applied equally to in-state and out-of-state interests. *See Clover Leaf Creamery*, 449 U.S. at 463 n. 7, 466, 471 n. 15.

The Eighth Circuit decision in this case is inconsistent with and expands this Court's dormant Commerce Clause precedent. If left unreviewed by this Court, the test applied by the Eighth Circuit could result in the invalidation of numerous state laws and leave states hamstrung in their attempts to provide for the well-being of their farming communities.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for a writ of certiorari.

Respectfully Submitted,

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